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## RIGHT TO ENJOIN THE PUBLICATION OF A PRIVATE PERSONAL LETTER, HAVING NO LITERARY VALUE.

A very important and interesting point of law has just come to our attention which involves the principle of the sacredness of a man's private correspondence. While the case in which this principle is sought to be applied is still pending at *nisi prius* it would not be proper for us to comment upon the facts involved in the particular case. It might be interesting, however, to the profession to understand the trend of the law on this question.

It needs no citation of authority to establish the principle that a man has a property right in the product of his own brain. This is known as literary property and is a valuable property right which cannot be filched from him with impunity any more than his watch or his horse.

Extending the rule as to literary property to private correspondence is not a far step nor one which should cause alarm or surprise. The first extension of the rule of literary property to epistolary correspondence was by authority of the celebrated case of Pope v. Curl, 2 Atk. 342. In this case a Mr. Curl threatened to publish abook of letters written by Mr. Pope, the famous poet, to various parties and which had been collected together. The objection was made that the rule as to literary property did not extend to private correspondence. To this objection the court replied: "I think it would be extremely mischievous to make a distinction between a book of letters, which comes out into the world, either by the permission of the writer, or the receiver of them, and any other learned work. * * * Another objection has been made by the defendant's counsel, that where a man writes a letter, it is the nature of a gift to the receiver. Possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has a joint property with the writer."

The case of Pope v. Curl, laid the foundation for the extension of the rule of literary property to private correspondence. This case was followed in England by the famous and leading case of Gee v. Pritchard, 2 Atk. 342, in which it was held that "the writer of letters though written without any purpose of publication or profit or any idea of literary property, possesses such a right of property in them, that they can never be published without his consent, unless the purposes of justice, civil or criminal, require the publication." This decision destroyed the distinction between manuscripts having literary value and those which did not, and on this point the Supreme Court of New York commenting on this decision in Woolsey v. Judd, 4 Duer, 379, says: "If this proposition be true, it follows that the distinction which has been supposed to exist between letters possessing a value as literary compositions, and ordinary letters of friendship or business, is wholly groundless. The right of property is the same in all, and in all is entitled to the same protection." See further as to English authorities following and confirming the views just announced the following cases: Thompson v. Stanhope, Ambl. 737; Howard v. Gunn, 32 Beav. 462; Andrews v. Roeburn, L. R. 9 Ch. 522; Granard v. Dunkin, 1 Ball. & B. 207; Palin v. Gathercole, 1 Call. Ch. Cas. 565; Perceval v. Phipps, 2 Ves. & B. 19; Labouchere v. Hess, 77 L. T. N. S. 559.

The American cases, with some dissent, it is true, have closely followed the rules laid down by the English courts. Denis v. Leclere, 1 Mart. (La.) 297, 5 Am. Dec. 712; Woolsey v. Judd, 4 Duer (N. Y.), 379; Grigsby v. Breckinridge, 2 Bush. (Ky.) 480; Eyre v. Higbee, 35 Barb. (N. Y.) 502. Two cases, both from New York courts, announced a limitation to the rule as to the inviolability of private letters as literary property by holding that the letters whose publication is sought to be enjoined must be of recognized literary value. Wetmore v. Scoville, 3 Edw. Ch. 515; Hoyt v. McKenzie, 3 Barb. 324. The chancellor in the latter case dissolved an injunction which the plaintiff had obtained to restrain a very mischievous and dishonest publication of confidential letters, upon the sole ground "that it was evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot

be considered of value to the author, for the purpose of publication, which he never would consent to have published." The weakness of this argument is quite apparent and both of the cases just cited were subsequently overruled in the case of Woolsey v. Judd, 4 Duer (N. Y.), 379, the court in this case saying: "We must all remember that the judgment in Hoyt v. McKenzie, from the sanction which it apparently gave to a very dishonorable proceeding, excited general surprise and regret, so that even those who admitted its legality, were anxious to relieve the law from the reproach which it occasioned. We are convinced that this reproach, that of giving a sanction to immorality, is one to which the law was never justly liable, and from the continuance of which it ought, therefore, to be freed."

These principles and the application thereof are well and concisely stated by Judge Story in the case of Folsom v. Marsh, 2 Story R. 100, as follows: "The author of any letter or letters, and his representatives, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and that, without his consent, the letters cannot be published, either by the persons to whom they are addressed, or by any others. But that, consistently with this exclusive right of the author, the person to whom the letters are addressed possesses, by implication, the right of publishing them on occasions which require or justify the publication. Thus, he may justifiably use and publish them in a suit at law or in equity, when such use is necessary or proper to maintain his action or defense. So, also, if he has been aspersed or misrepresented by the writer of the letters, or accused of improper conduct in a public manner, he may publish such parts of the letter or letters, and no more, as may be necessary to vindicate his character, and free him from unjust obloquy and reproach. But if he attempt to publish the letters, or any parts of them, against the wishes of the writer, and on occasions not justifiable, a court of equity will prevent the publication by an injunction, as a breach of that exclusive property in the letters which the writer retained."

TELEGRAPHS—MENTAL ANGUISH AS CONSTITUTING A GROUND FOR THE RECOVERY OF DAMAGES.—The interesting and controverted question as to the right to recover for mental anguish alone is again thrashed over in the recent case of Green v. Western Union Telegraph Co., 49 S. E. Rep. 165, where the Supreme Court of North Carolina holds that mental anguish caused by the negligence of a telegraph company in failing to deliver a message announcing the arrival of a 16 year old girl alone on a midnight train in a town where she was a stranger constitutes a basis for the recovery of damages in an action by her against the telegraph company, though the anguish consisted merely in annoyance resulting from the failure to have some one meet her at the station.

The court covers this question quite fully in the opinion written by Judge Douglas, and the sentiments there expressed will be read with interest by members of the profession who have been following the trend of the law on this important question. The court said:

"The defendant in its brief thus states the question intended to be presented: 'This case boldly presents the question which it has been apparent would soon arise, whether the barriers are to be thrown down, and every disappointment, annoyance, or vexation which may arise from a delay or a misdirected telegram can be the subject of an action for mental anguish. In other words, whether any annoyance, disappointment, vexation, or anxiety on account of a missing friend at the station, or from other cause, can be dignified by the name of "mental anguish," and adjudged to rank in the same class with the poignant grief arising from a failure to reach the bedside of a dying wife in time to receive her last adieus.' We are fully aware of the importance of the question thus presented, and have given it the careful consideration which it deserves. We do not desire to impose any additional burdens upon telegraph companies or require any unnecessary restrictions, but we cannot ignore the essential purpose of their creation. A telegraph company is a *quasi* public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession, and freedom from individual liability, and possesses, also, in addition thereto, the extraordinary privileges which under our constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there

would be neither reason for its creation, nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English judge: 'A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.' This has been expressly held by this court in Cashion v. Tel. Co., 124 N. C. 459, 32 S. E. Rep. 746, 45 L. R. A. 160; Landie v. Tel. Co., 124 N. C. 528, 32 S. E. Rep. 883; and Cogdell v. Tel. Co., 135 N. C. 431, 47 S. E. Rep. 490.

The demurrer admits all the facts alleged in the complaint, construed in the light most favorable to the plaintiff. It is therefore admitted that the message was received by the defendant, and not delivered until the following day, when called for by the sendee. This of itself raises the presumption of negligence. Sherrill v. Tel. Co., 116 N. C. 655, 21 S. E. Rep. 429; Hendricks v. Tel. Co., 126 N. C. 304, 35 S. E. Rep. 543, 78 Am. St. Rep. 658; Landie v. Tel. Co., 126 N. C. 431, 35 S. E. Rep. 810, 78 Am. St. Rep. 668; Rosser v. Tel. Co., 130 N. C. 251, 41 S. E. Rep. 378; Hunter v. Tel. Co., 130 N. C. 602, 41 S. E. Rep. 796; Cogdell v. Tel. Co., 135 N. C. 431, 47 S. E. Rep. 490. Aside from this presumption, we think the facts alleged clearly tend to prove negligence on the part of the defendant. The telegram was addressed to Mrs. Jno. B. Lee, 2010 Main street. The name of the sendee was changed in transmission to Mrs. Knoblee. The defendant urges in excuse for such negligence the similarity between the telegraph "J" and "K." This is no legal excuse. Cogdell v. Tel. Co., 135 N. Car. 431, 47 S. E. Rep. 490. If the defendant adopts a code intrinsically liable to such mistakes, it should exercise the greater care in preventing them. The defendant's agents could at least have inquired at the street address given in the telegram. Such inquiry would doubtless have resulted in ascertaining the indentity of the sendee. Such was the result when Mrs. Lee called for the telegram on the following day. The plaintiff alleges that she suffered mental anguish, and this is also admitted by the nonsuit. Aside from this, we think the circumstances in which she was placed may well have caused it. A girl 16 years of age finds herself after midnight in a strange city, riding two miles in a carriage with an unknown driver. It is true, she suffered no insult or physical injury; but the question is, what would be the natural effect upon the mind and nervous system of a child of her age? Nature offers no flower more tender or more fair than budding womanhood, and around it every protection will be thrown by the hand of the law. The defendant was informed of the full purpose of the telegram, and the importance of its immediate delivery. It therefore remains only to consider whether, under the admitted facts, the plaintiff is entitled to recover compensatory damages for the mental anguish she may have suffered as the direct result of the defendant's negligence. We see no reason why she cannot, and we find no authority in this state to the contrary."

The court then reviews all the authorities on this question. Closing its opinion with this valuable summary of its exhaustive researches into the authorities, the court said: "In this connection we have endeavored to ascertain the latest decisions of the courts of the different states upon this subject. When we remember that this doctrine of mental anguish in telegraph cases is of recent origin, having therefore been deemed contrary to the principles of the common law, and has made constant progress in opposition to the preconceived ideas of courts and jurists, it seems that it must possess much inherent strength and merit. This is especially evident from the actions of certain courts, some of them of the highest reputation, which, while denying the doctrine in telegraph cases that damages for mental suffering may be recovered in the absence of physical pain or injury, allow it in cases of a kindred nature, such, for instance, as insulting or humiliating a passenger. The following is the present status of the doctrine in the different states, as far as we have been able to ascertain:

Its history in the state of Texas, where it was first specifically announced, may be briefly stated as follows: The first case in that court is the celebrated one of So Relle v. Telegraph Company, 55 Tex. 308, 40 Am. Rep. 805. There it was held that there could be a recovery in such cases. The next cases were Railway Company v. Levy, 59 Tex. 542, 46 Am. Rep. 269, and *Id.*, 59 Tex. 563, 46 Am. Rep. 278. These cases were construed by the profession as in some respects modifying the doctrine in the first case. The question again arose in Stuart v. Western Union Telegraph Company, 66 Tex. 580, 18 S. W. Rep. 351, 59 Am. Rep. 623, and the rule announced in So Relle's case was followed. That case was very thoroughly considered, and the decision then made has settled the law in that state upon the main question. Its reports show some 50 cases since in which the doctrine has been followed without question.

In Tennessee the doctrine was first announced in Wadsworth v. Telegraph Company, 86 Tenn. 695, 8 S. W. Rep. 574, 6 Am. St. Rep. 864, and has been reaffirmed in Telegraph Company v. Mellon, 96 Tenn. 72, 33 S. W. Rep. 725, and Gray v. Telegraph Company, 108 Tenn. 39, 64 S. W. Rep. 1063, 56 L. A. 301, 91 Am. St. Rep. 706.

In Alabama the doctrine was expressly recog-

nized in Telegraph Company v. Henderson, 89 dAla. 510, 7 So. Rep. 419, 18 Am. St. Rep. 148, but seems to have been somewhat modified in the more recent case of Telegraph Company v. Crumpton, 138 Ala. 632, 36 So. Rep. 517, which appears to be the latest decision upon the subject.

In Kentucky the leading case in which such damages are allowed is Chapman v. Telegraph Company, 90 Ky. 265, 13 S. W. Rep. 889. The doctrine is affirmed in the later cases of Telegraph Company v. Van Cleave, 107 Ky. 464, 54 S. W. Rep. 827, 92 Am. St. Rep. 366, and Telegraph Company v. Fisher, 107 Ky. 513, 54 S. W. Rep. 830.

In Iowa damages for mental anguish unaccompanied by physical pain are allowed. The leading case is Mentzer v. Telegraph Company, 93 Iowa, 752, 62 N. W. Rep. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294, a carefully considered case, which has been widely cited. This case stood as the only expression of that court upon the subject until the recent case of Cowan v. Telegraph Company, 98 N. W. Rep. 281, 64 L. R. A. 545.

In Louisiana such damages are allowed. The leading and most recent case is Graham v. Telegraph Company, 34 So. Rep. 91.

In South Carolina they are also allowed. At first the doctrine was denied in Lewis v. Telegraph Company, 57 S. Car. 325, 35 S. E. Rep. 556. This case was followed by an act of the legislature (23 St. at Large, 748; Civ. Code, 1902, vol. 1, § 2223) permitting damages in such cases. This statute was held to be constitutional in Simmons v. Telegraph Company, 63 S. Car. 429, 41 S. E. Rep. 521, 57 L. R. A. 607, which has subsequently been uniformly followed.

In Nevada the doctrine has been recently adopted in the case of Barnes v. Telegraph Company, 76 Pac. Rep. 931, 65 L. R. A. 666, in an able and learned opinion by Fitzgerald, J.

In Washington there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in Davis v. Tacoma Ry. & Power Company, 35 Wash. 203, 77 Pac. Rep. 209, in which telegraph cases are cited with approval. The doctrine is denied in the following states, as is shown by the most recent cases:

Florida: Telegraph Company v. Saunders, 32 Fla. 434, 14 So. Rep. 148, 21 L. R. A. 810, apparently the only case upon the subject in that state.

Georgia: Chapman v. Telegraph Company, 88 Ga. 663, 15 S. E. Rep. 901, 17 L. R. A. 439, 30 Am. St. Rep. 183; Giddens v. Telegraph Company, 111 Ga. 724, 35 S. E. Rep. 638.

Illinois: Telegraph Company v. Haltom, 71 Ill. App. 63. The question does not appear to have come before the supreme court of that state.

Indiana: Telegraph Company v. Ferguson, 157 Ind. 64, 60 N. E. Rep. 674, 1080, 54 L. R. A. 846.

Kansas: West v. Telegraph Company, 39 Kan. 93, 17 Pac. Rep. 807, 7 Am. St. Rep. 530, appears to be the latest telegraph case in that state involving the question; but that case has been reaffirmed in Railway Company v. Dalton, 65 Kan 661, 70 Pac. Rep. 645.

Minnesota: Francis v. Telegraph Company, 58 Minn. 252, 59 N. W. Rep. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, which is the only case in that state.

Mississippi: Telegraph Company v. Rogers, 68 Miss. 748, 9 So. Rep. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300. This case has apparently been doubted in one or two subsequent cases, which, however, are not directly in point.

Ohio: Morton v. Telegraph Company, 53 Ohio St. 431, 41 N. E. Rep. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648, seems to be the only case in that state involving the question.

West Virginia: Davis v. Telegraph Company, 46 W. Va. 48, 32 S. E. Rep. 1026.

Wisconsin: Summerfield v. Telegraph Company, 87 Wis. 1, 57 N. W. Rep. 973, 41 Am. St. Rep. 17.

Virginia: Connelly v. Telegraph Company, 100 Va. 51, 40 S. E. Rep. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919. In this state a statute was passed upon the subject, which apparently failed of its purpose.

In the following states there have been no decisions in telegraph cases upon the question, so far as we have been able to ascertain: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Wyoming."

See also as bearing pertinently on this question 60 Cent. L. J. p. 203.

## FIRE AND LIFE INSURANCE AS SECURITIES FOR CLAIMS OF CREDITORS.

*Fire Insurance as a Security for Claims of Creditors.*—Insurance weaves itself into almost every trade and profession. It is a very important factor in the success of merchants, manufacturers and common carriers. Of the three, the merchants carry the most insurance. This is so, perhaps, owing to the fact that they do more business with men of limited amount of capital which necessitates their purchasing on credit.

In order that commercial relations might be more substantial[1] it is necessary for the creditor to be protected against a loss by destruction of his debtor's property to which he looks for a satisfaction of his demands. This is so vital to trade that insurance business

[1] Nusbaum v. Northern Ins. Co., 1 L. R. A. 704.

borders very close to interstate commerce. This is evidenced by insurers trying to enter states without conforming to the state laws, on the ground that the state cannot interfere with interstate traffic.[2] Although insurance is not interstate commerce, it would be impeded without its aid. Yet, this aid is such as comes within state supervision.[3]

Where goods are purchased on credit, insurance is very often taken out by the vendee to protect the vendor. As between the two there need be no contract to that effect. The latter takes the benefit the same as a beneficiary would under an ordinary life insurance policy.[4] So, a retail dealer in jewelry may insure for the benefit of his wholesale merchant.[5]

In most of the states contractors have a statutory lien upon buildings under construction for labor and material furnished. So, if the debtor wishes to protect himself and his creditor, or give the latter better security, he can do so by insurance.[6]

Insurance for the protection of creditors by the debtor under an express contract has been upheld in innumerable cases.[7] It was held that where a mortgagor insured in his own name for the benefit of the mortgagee, and had received the benefit from the insurance company, that the mortgagee could recover the insurance money in the hands of the mortgagor as against an attaching creditor.[8] But if the mortgagor has taken it out for his own use,[9] the mortgagee is precluded from recovering on the policy.[10] In such a case as this, the mortgagee is placed in the same position as an ordinary creditor.[11]

If an insurance policy is assigned to the mortgagee for his benefit, he may recover on the policy if the property is destroyed.[12] The amount that he is entitled to recover is measured by the loss sustained by the assignor.[13]

But where the property has been destroyed and the mortgagor has insured for the mortgagee's benefit and wishes to recover, he must show that the debt has been paid and that the mortgagee has no interest in the property.[14] The mortgagee can recover on a policy where he has been made beneficiary after foreclosure suit and sale, if the mortgagor's right of redemption has not been cut off.[15]

Where title passes from the vendor to the vendee unrestricted, the former loses all insurable interest. But it is otherwise if he retains a lien.[16]

A judgment lien is a hold on all the property of the judgment debtor. The real property cannot be sold to satisfy the lien until the personal property has been exhausted; thus making it a general lien as distinguished from the specific lien that the mortgagee holds.[17] So, if the debtor's personal property becomes insufficient to pay the judgment lien holder, it is evident that the latter would suffer a pecuniary loss on a destruction of the property.[18] If he is protected by an insurance, he can recover on the general principles of insurance.[19]

The interest that a mechanic lien holder has in buildings under construction for labor and materials furnished is the same as that of the owner to the extent of his claim.[20] Its nature is that of a *jus ad rem* and can be protected by insurance. The amount of

[2] Hooper v. California, 155 U. S. 648; Hall v. Virginia, 8 Wall. 168.

[3] Crutcher v. Kentucky, 141 U. S. 47 at 59, and cases there cited. *Contra*, see article in 38 Am. Law Review, 181 at 192.

[4] Bates v. Ins. Co., 10 Wall. 33.

[5] Guiteman v. Ger. Am. Ins. Co. (Mich.), 70 N. W. Rep. 135.

[6] Foley v. Farragut Ins. Co., 24 N. Y. Supp. 1131, at bottom of page 1132, citing 3 Summ. 132.

[7] Irving v. Richardson, 2 B. & Ad. 193, 22 E. C. L 59; Jackson v. Mass. M. F. Ins. Co., 23 Pick. 418, 34 Am. Dec. 69; Carpenter v. Continental Ins. Co., 61 Mich. 535.

[8] Lieukauf v. Calman, 110 N. Y. 50, 17 N. E. Rep. 389.

[9] Wheeler v. Factor, etc., Ins. Co., 101 U. S. 439.

[10] Providence Co. Bank v. Benson, 23 Pick. 204, 41 Mass. 204.

[11] Columbia Ins. Co. v. Lawrence, 10 Peters, 512.

[12] Biddeford S. B. v. D. Ins. Co., 81 Me. 566, 18 Atl. Rep. 298.

[13] Baltis v. Dobin, 67 Barb. 509; Grosvenor v. Atl. F. Ins. Co., 71 N. Y. 391.

[14] Ennis v. Harmony Ins. Co., 3 Bos. 516.

[15] Nat. Bank v. Union Ins. Co., 88 Cal. 497, 22 Am. St. Rep. 324; West v. Chamberlin, 8 Pick. 338.

[16] McLaren v. Hartford F. Ins. Co., 5 N. Y. 151.

[17] 13 Am. & Eng. Ency. Law, 181, and cases cited in note 7.

[18] Grevemeyer v. S. M. Ins. Co., 62 Pa. St. 340 at 342; Britton's Appeal, 45 Pa. St. 172-7-8; Ruth's Appeal, 54 Pa. St. 173 at 174. And see Spare v. Home Mutual Ins. Co., 15 Fed. Rep. 707.

[19] Spare v. Home Mutual Ins. Co., *supra*; Rohrbach v. Germania Ins. Co., 62 N. Y. 47 at 52; Carter v. Ins. Co., 12 Iowa, 287.

[20] 13 Am. & Eng. Ency. of Law, 142, and cases cited in note 8.

money to be recovered by the insured is measured by the amount of labor performed and expenses incurred plus the profits he was prevented from realizing.[21]

A contractor, who agrees to build a house and furnish the materials, and is to be paid as the work proceeds, and if not completed by a fixed day, forfeit a certain sum of money, has an insurable interest.[22] He can recover from both the debtor and insurance company if the latter does not demand subrogation, although this is not in conformity with commercial morality.

Improvements upon real property enhances its value. And so, a mechanic's lien holder is entitled to recover on his policy as against subsequent creditors on the ground that it was through the former's outlay that the property was kept up.[23] This last phase of the law is pleaded very frequently by defendants in railroad mortgage foreclosures.

Mortgages on real estate are securities for obligations.[24] Any depreciation in the value of the mortgaged property lessens the mortgagee's security. So, if the property is destroyed, he may suffer a pecuniary loss, which can only be guarded against by insurance. This is sufficient to give him an insurable interest.[25]

A mortgagee, who takes out insurance in his own name and also in that of the mortgagor, who pays no part of the premium and who is not aware of the insurance on the pledged property, can recover for he is the party who paid the consideration.[26] So, if he insures with the debtor's consent, he has an insurable interest. His amount of recovery is commensurate with his claim plus his necessary expenses incurred in litigation.[27]

A vendee fraudulently concealed his insolvency from a vendor of whom he bought merchandise on credit. The vendor passed title and retained no lien upon the goods for the purchase price but depended on the solvency of the vendee. The creditor took out insurance on the goods sold without the knowledge or consent of the debtor. Afterwards the goods were destroyed. Query, has the creditor such an insurable interest in the goods parted with that he can recover on his policy?[28]

The personal and real property of a decedent is liable for all his debts.[29] The real estate cannot be reached by the creditors until the personal property has been exhausted.[30] Therefore, where a creditor's claim is subordinate to a special lien which will exhaust all the personalty, he will have to look to the realty for his satisfaction. If a destruction of the property would lessen the fund to which he looks for payment, he has a right to protect himself against loss by insurance.[31] And, "if a creditor cannot obtain satisfaction of his debt out of the personal property of his deceased debtor, and has a legal right which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and it be true that a destruction of the building by fire would immediately and necessarily result in a pecuniary loss, the loss being the direct consequence of the fire, the creditor has an insurable interest in the protection of the building."

*Life Insurance as a Security for Claims to Creditors.*—Fire insurance as a security for claims of creditors protects those creditors only who have a special interest in the insured property, for instance, a mortgagee[32] a judgmentli en holder,[33] a vendor,[34] who has retained a lien, and the creditors of a decedent.[35] Thus, the possibility of a great number of creditors having their claims unsatisfied is very plain. The debtor's property may be free from execution,[36] or he

[21] Ins. Co. v. Stinson, 103 U. S. 25 at p. 30.

[22] Com. F. Ins. Co. v. Capital Ins. Co., *post*; Planters Mer. Ins. Co. v. Thurston, 93 Ala. 255; Conn. Ins. Co. v. Capital Ins. Co., 81 Ala. 320, 8 So. Rep. 222.

[23] 20 Am. & Eng. Ency. of Law, 479, and cases cited in note 2.

[24] 1 Washburn Real Property, * page 475; Webster's Int. Dictionary, 946, col. 1; Standard Dictionary, 1152, col. 2.

[25] Columbia Ins. Co. v. Lawrence, 2 Peters, 25 at p. 47.

[26] The West Fire Ins. Co. v. Foster, 90 Ill. 121.

[27] Chamberlin v. Ins. Co., 55 N. H. 249 at 257. Also see Barnes v. U. M. F. Ins. Co., 45 N. H. 21 at 28.

[28] See Roos v. Merchant's Mut. Life Ins. Co., 27 La Ann. 409, and Vargas v. Newhall, 15 Me. 314.

[29] Hewett v. Cox, 55 Ark. 225; Chinn v. Stoubt, 10 Mo. 709; Southerland v. Harrison, 86 Ill. 363.

[30] Guy v. Gericks, 85 Ill. 428; Pierce v. Calhoun, 59 Mo. 271; Stuart v. Kissam, 11 Barb. 271; Selover v. Coe, 63 N. Y. 438.

[31] Rohrbach v. Germania Ins. Co., *supra*; Creed v. Sun Fire Ins. Co., 14 So. Rep. at 326 for quotations, Coleman J. delivering opinion of the court.

[32] *Supra.*

[33] *Supra.*

[34] *Supra.*

[35] *Supra.*

[36] 11 Am. & Eng. Ency. of Law 59, *et seq.*

may be notoriously insolvent. The only thing to which the creditor now may look to, is the possibility of the debt or paying the claim in the future or having property sufficient at that time for its satisfaction. The creditor, therefore, becomes very much interested in the continuance of the debtor's life. Life being a very uncertain thing, the former's relief may be cut off at any time.

The risk he has to run is very great and this risk can only be protected by life insurance. As a creditor, he would undoubtedly suffer a pecuniary loss.

"A creditor has certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend upon it, at all events the death must in all cases, in some degree lessen the security." (Lord Kenyon).

An insurance policy taken out by the debtor for the benefit of his estate entitles the heirs and next of kin to take no share thereof until the creditors of the estate have been satisfied.[37] Nor is such a policy in violation of a statute[38] which forbids creditors from participating in the proceeds of a policy payable to certain named beneficiaries.[39]

So where an insurance policy is taken out by the debtor on his own life for a large sum at the suggestion of the creditor, who takes it by assignment to secure a claim of seventy dollars and agrees to pay over one third to the insured's wife, such a policy is valid as to his claim and expenditures.[40]

Life insurance taken out by a creditor at the suggestion of the debtor is good when done in good faith. As in the case where a man is indebted a large sum and suggests to the creditor to procure a policy on the former's life and the latter keep it up, and if the debt is paid and all moneys refunded to the creditor that he expended in procuring and keeping up the policy, and then deliver the policy to the debtor, is good and the administrator is not entitled to any of the surplus proceeds.[41]

And so, where a creditor insures the debtor's life to secure his claim can recover on his policy if he can show that it was procured in good faith.[42] A policy was obtained by a creditor upon the life of his debtor, who was his aunt. The debt was five hundred dollars and the contract of insurance called for two thousand dollars. It was held that the relation was not sufficient to give him an insurable interest, but that the debt was.[43] So where an army officer who had a large amount of money due from a soldier, could recover the full amount of the debt plus the money expended in procuring the insurance although the deceased was ignorant of such an accounting.[44]

*Assingnments Affeoting Iuterests of Crcditors.*—In many jurisdictions an assignee does not necessarily have to have an insurable interest in the assignor.[45] He takes the rights under the assignment as an ordinary assignee of a chose in action. But why should an insured be required to have an insurable interest and the assignee none when the results are the same? Wouldn't an assignee without an interest be benefited by the assignor's early death? "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest."[46]

An assignment by a beneficiary may be given as a security for a debt. As where a husband takes a policy out on his own life for the benefit of his wife, who assigns it as a security for his debts.[47] But where a *feme*

[37] Pietri v. Segunot (Mo. 1902), 69 S. W. Rep. 1055.

[38] Rev. Stat. of Mo., 1899, sec. 7908.

[39] Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. Rep. 464. Also see Pietri v. Segunot, *supra*, at page 1057.

[40] Cammack v. Lewis, 15 Wall. 643. Also see Ruth v. Katterman, 112 Pa. St. 251; Roller v. Moore, 86 Va. 512.

[41] See a leading case, Amick v. Butler, 111 Ind. 578; 12 N. E. Rep. 518, 60 Am. Rep. 722, and citations and quotations at length on pages 583-4-5. Also see Wheeland v. Atwood, 192 Pa. St. 237, 43 Atl. Rep. 946.

[42] Strode v. Meyers, etc., Drug Co. (Mo. App.), 74 S. W. Rep. 379; Amick v. Butler, *supra*; Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. Rep. 459, 44 L. R. A. 372.

[43] Grant v. Kline (Pa. St.), 9 Atl. Rep. 150.

[44] Bruce v. Gardner, L. R. 5 Ch. 32.

[45] Mechanic's Nat. Bank v. Comins (N. H.), 55 Atl. Rep. 191, and cases cited.

[46] Warnock v. Davis, 104 U. S. 775 (Mr. Justice Field). Also refer to Kessler v. Kuhns, 1 Ind. App. 511 at page 515, as to the error of Elliott on Insurance, sec. 63, and the New Hampshire Court in Mech. Bank v. Comins, *supra*; Alabama, etc., Ins. Co. v. Mobile, etc., Ins. Co., 81 Ala. 329. Also see Stevens v. Warren, 101 Mass. 564.

[47] Collins v. Dawley, 4 Colo. 139, 34 Am. Rep. 72.

*covert* is prohibited by statute from becoming a surety[48] she cannot assign her rights under the policy as a security for an obligation.[49]

An assignment of a life insurance policy as collateral security by both the debtor and the beneficiary will be good when done in good faith.[50]

The creditors are so much interested in the debtor's life, and his real and personal property, that an assignment of an insurance policy covering either of them would be a fraud upon his creditors if he is insolvent.[51] A debtor, who was notoriously insolvent, procured a policy upon his life and assigned the same to a creditor as collateral security. It was held in an action against the assignee who had received the benefits under the policy, that such an assignment was fraudulent as to the other creditors.[52] But an assignment of a policy by an insured upon his own life to his wife, children, dependent relations, or to a creditor, is good as against the claims of general creditors.[53] An assignment by a wife, in trust for the benefit of her children, of a policy upon her husband's life, taken out for her benefit, is not fraudulent as to her creditors.[54]

An assignment of a policy as collateral or as a gift by a debtor, who was solvent at the time, to one whom he owes is not such a conveyance as would be a fraud upon his creditors.[55] So, where a bankrupt deposits a policy as security with creditors who have advanced him money, entitles the latter to retain the policy as against his assignees (trustees) in bankruptcy.[56]

*What Determines the Amount Recovered by the Creditor.*—The creditor is entitled to the proceeds of a policy, where it does not exceed his debt with interest and expenditures in obtaining the policy.[57] Nor can an insurance company be compelled to pay a greater sum than the insured's debt, with interest.[58]

The executors or administrator of a debtor are not entitled to any of the proceeds on a policy, when the creditor takes it as a beneficiary under a will.[59] But when the heirs are entitled to an insurance fund as heirs, they can take none until the creditors have been satisfied.[60]

Life insurance, as a security for claims of creditors, is not strictly an indemnity contract, yet, if the amount claimed by the creditor is notoriously excessive, it will savor of a wager policy and will not be enforced by the court.[61] The age of the debtor, his expectation of life, the premiums that the creditor has paid, or will likely have to pay, with interest, and the debt, with interest, are all important factors to take into consideration in estimating what the creditor is entitled to recover.[62]

ROY ELIAS RESSLER.

Tipton, Indiana.

[48] Burns Rev. Stat. of Ind. 1901, sec. 6964.

[49] Kessler v. Kuhns, *supra*; Thornburg v. Ætna Life Ins. Co. (Ind. App.), 66 N. E. Rep. 922. Also see, Beach on the Laws of Contracts, sec. 1335, and see Wheeland v. Atwood, *supra*.

[50] Emerick v. Coakley, 35 Md. 188. *Contra*, see Union Central L. Ins. Co. v. Woods, 11 Ind. App. 335; Beach on the Law of Contracts, *supra*.

[51] 19 Am. & Eng. Ency. of Law, 89, and cases cited in notes 1, 2, 3, 4.

[52] Prentice v. Steele, 4 Montreal Sup. Ct. Rep. 319.

[53] Elliott v. Bryan, 64 Md. 365; Ernshaw v. Stewart, *Id.* 513.

[54] Smillie v. Quinn, 90 N. W. Rep. 492; State v. Thompson, 16 Ind. App. 662.

[55] King v. Cram (Mass.), 69 N. E. Rep. 1049.

[56] Gibson v. Oversbury, 7 M. & W. 555.

[57] Amick v. Butler, *supra*.

[58] Coon v. Swan, 30 Vt. 6.

[59] Stoelker v. Thornton, 88 Ala. 241; Catholic Knights v. Kuhn, 91 Tenn. 214.

[60] Harley v. Heist, 86 Ind. 196; Milner v. Bowman, 119 Ind. 448 at 453, explaining Harley v. Heist, *supra*.

[61] Cammack v. Lewis, *supra*; Cooper v. Weaver (Pa. 1887), 11 Atl. Rep. 780; Cooper v. Schaefer (Pa. 1887), 11 Atl. Rep. 548; Stroude v. Meyer, etc., Drug Co., *supra*.

[62] See a well reasoned case, Ulrich v. Reinoehl, 143 Pa. St. 625.

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ACCOUNTING—FRAUDULENT TRANSACTIONS

WOODSON v. HOPKINS.

*Supreme Court of Mississippi, February 27, 1905.*

Where the loaner of money at extortionate rates of interest and by contracts void as against public policy established an agency in charge of defendant, who subsequently claimed the business as his own and refused to account, his principal could not maintain a bill to recover the money and for injunction and receiver, depending for a decree on said illegal contracts and transactions.

WHITFIELD, C. J.: The case made by the record is briefly this: That a certain Dr. Hopkins, of Atlanta, Ga., was the owner of a number of loan agencies in various states; a number in Memphis, Tenn., and a number in Vicksburg, Miss. They were conducted under assumed names: Cobb & Co., Shaw & Co., Mathis & Co., etc. Shaw & Co. was the assumed name given to the office of Hop-

kins conducted by S. T. Woodson, as agent, in Vicksburg. The business consisted in loaning money in small sums to necessitous and ignorant people, mostly negroes; and this name of Shaw & Co. was taken, evidently, for the purpose of preventing any borrower from suing to recover back usury paid, and was a disguise to hide the real person who had collected the usurious interest. This interest amounted to 35 per cent. per week. A borrower, for example, would borrow say, $10 and 35 per cent. amounted to $3. 50, which would be added to the $10 loaned, making $13.50, and this sum of $13.50 would form the consideration of a bill of sale of the borrower's household effects, and was required to be paid in one week. This unconscionable business seems to have resulted in large profits to Hopkins. Woodson claims, and proves, by himself and a witness, Chaney, that he made an agreement with Hopkins, when last in Vicksburg, that upon the payment to Hopkins of $2,300 the business of Shaw & Co. should become the property of Woodson; and Woodson testified that Hopkins only put in something over $1,000 orignally, and that on the 7th of April, 1904, he had drawn out the sum of $2,300; and that by the terms of the agreement he then took the business and property of Shaw & Co., and declined to further account to Hopkins after that date. He also in his answer alleged that there were no executed transactions from which any money arose, and remained in his hands at the time of this suit, that he by law could be required to account to Hopkins for, and Hopkins, of course, wholly denies all the statements with respect to the purchase of the business. This suit was brought by him in the chancery court of Warren county against Woodson to recover moneys alleged to be the result of this business, and remaining in Woodson's hands for him. Hopkins had Woodson arrested and imprisoned and undertook to take charge of the business, and sued out an injunction against Woodson and others, enjoining them from having anything to do with the alleged property of Shaw & Co., and restraining them from collecting any of the amounts of money alleged to be due Shaw & Co., and from using the office in which the business had been transacted. Hopkins afterwards amended his bill, and the prayer of the bill was as follows:

"Complainant therefore prays that, pending this suit, a receiver may be appointed by this honorable court with full authority to take charge of all of the property which was used in and about the business of said Shaw & Company, including all office furniture and fixtures, and all of the books and accounts and evidences of indebtedness belonging to or used in connection with the said business of Shaw & Company, and of the office in which said business was conducted, and that the defendants, S. T. Woodson, W. H. Sublett, and A. J. Gebhardt, or either of them who may have the same in his custody, may be commanded and directed forthwith to deliver and turn over to the said receiver all property of every sort and description whatsoever pertaining to or growing out of the said business conducted under the name of Shaw & Company, as aforesaid, including all books, accounts, memoranda, route cards, and other evidences, showing what loans were made and to whom made, and what amounts have been paid thereon, and what amounts remain due thereon, and the places of residence of the persons making such loans from said Shaw & Company, and that said receiver be authorized and empowered to take and receive all of said property, and that he be directed to collect, as conveniently as may be, all sums of money which may be due and owing, as having been borrowed and obtained from the said Shaw & Company, and that he retain in his possession, to abide the final determination of this suit, the said office and all sums so collected by him, and all other property of every description which may come into his possession as having pertained to the business of said Shaw & Company, directly or indirectly, until further ordered by this court."

Part of this prayer calls for, it will be observed, a direction that the receiver shall collect all sums of money which may be due and owing Shaw & Co., and the turning over to the said receiver of all books, accounts, etc., showing what loans were made, to whom made, what amounts had been paid thereon, what amounts remained due, and the place of residence of the persons making such loans. The final decree is as follows:

"Ordered, adjudged, and decreed that the injunction heretofore issued herein against the said defendants S. T. Woodson, W. H. Sublett, and A. J. Gebhard be, and the same is hereby, made perpetual. It is further ordered, adjudged, and decreed that the said defendants deliver to the complainants herein, within ten days after the date of this decree, all books, memorandums, route cards, accounts, or evidences of indebtedness and all other property of any and every sort and description which came into their possession, or into the possession of either of them, as managers, agents, or employees in and about the business heretofore established in the city of Vicksburg, Mississippi, by the complainant under the name and style of Shaw & Company, and that they also pay over to the complainant all moneys which may have been collected by them growing out of the management and control by them of the business so conducted under the name of Shaw & Company."

The answer sets up the defense that the contract between Hopkins and Woodson, and these usury contracts—so extortionate as to shock the moral sense upon mere statement—were illegal and violated the public policy of this state, and that the bill, consequently, should not be maintained, but that the court of conscience, on well-settled principles, would leave these plunderers where it found them. Undoubtedly, the usury contracts, to the extent of the usury, were illegal and against public policy. 15 A. & E. Ency. of Law,

939e. But aside from this feature, we hold without hesitation, that no such robbing contracts as this record discloses can be other than against the public policy of the state, on account of their extortionate character. In 15 A. & E. Ency. of Law, p. 933, par. 4, subd. 2, it is said: "While the chief sources for determining the public policy of a nation are its constitution, laws, and judicial decisions, still however, these are not the sole criteria and the courts should not hesitate to declare a contract illegal merely because no statute or precedent prohibiting it can be found."

We approve this as sound doctrine strictly applicable to the case made by this record. The true doctrine as to the inability of either party to a contract against public policy being permitted to invoke the aid of a court of law or equity is thus stated in the same authority (pages 998, 999, 1001): "Where illegal contracts are executed by the parties, then the same principle of public policy which leads courts to refuse to act when called upon to enforce them will prevent the court from acting to relieve either party from the consequence of the illegal transactions. In such cases the defense of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff. The court does not give effect to the contract, but merely refuses its aid to undo what the parties have already done." "The fact that the party seeking to enforce executory provisions of an illegal contract, though they consist only of promises to pay money, has performed the contract on his part, and that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions. Nor can the party performing, on his part, the provisions of an illegal contract, recover on the ground of an implied promise on the part of the party receiving the benefits therefrom to pay therefor, as the law will imply no promise to pay for benefits received under an illegal contract by reason of the performance thereof by the other party."

The same doctrine is admirably stated in 9 Cyc. of Law, 246: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims '*Ex dolo malo non oritur actio*,' and in '*In pari delicto potior est conditio defendentis*.' The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other or when the agreement has been executed, in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. While it may not always seem an honorable thing to do, yet a party to an illegal agreement is permitted to set up the illegality as a defense, even though it may be alleging his own turpitude. Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are *in pari delicto*. And goods delivered or lands conveyed under an illegal agreement are subject to the same rule. Courts will not, even with the consent of the parties, enforce an illegal contract. And it would seem to follow that an illegal agreement cannot be rendered legal by ratification. An agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel."

The distinction has been sought to be drawn, but only in some few cases, to the effect that, if a contract has been executed and one of the parties has the avails, all the harm that can be done to public policy has been done, and the party having the avails can be compelled to pay over the whole of them, or a proportionate share of them, to the other party. In 15 A. & E. Ency. of Law, 1011, it is stated as to partnerships: "In some cases, however, the proposition has been advanced that, if the illegal purpose of the partnership has been accomplished, the courts may direct a division of the proceeds;" but the text repudiates this as unsound. Gilliam v. Brown, 43 Miss. 641, is one of the cases holding this repudiated view. The Cyclopedia of Law states the same doctrine as the American and English Encyclopedia of Law on this subject, noting, however that there are "a number of decisions" holding like Gilliam v. Brown, but that is not the true view, saying, at page 559: "Theoretically, it is said by a recent writer, there is a distinction between enforcing an illegal contract and enforcing a duty not springing from the contract but arising solely from the receipt of the money or goods. But practically it is impossible to reconcile the actual decisions on this point. A number of courts have refused to allow a recovery by a principal or partner in an illegal enterprise, on the ground that to do so would be to enforce, or at least to recognize, the illegal agreement"—and in a note appends a masterly statement of the true doctrine by Jessel, M. R., in Sykes v. Beadon, 11 Ch. Div. 170: "The motion that because a transaction which is illegal is closed, that therefore a court of equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority; to authority in the well known case of the highwayman, where a robbery had been committed, and one highwayman unsuccessfully sued the other for the division of the proceeds of the robbery. So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an ac-

count of the smuggling transaction? I should say certainly not. It is not sufficient to say that the transaction is concluded, as a reason for the interference of the court. If that were the reason, it would be lending the aid of the court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the court cannot maintain it, and the court will not lend its aid at all to it. That reasoning, then, of Lord Cottonham is not sufficient, and I should have answered the question, not, as Lord Cottonham does, in the affirmative, but in the negative. I do not say that this observation at all affects the authority of Sharp v. Taylor as it stands, but I think it does affect very much the *dicta* which I have read from the judgment, and that is the reason I have read them. It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

The doctrine thus stated by that great jurist is also put unanswerably in Hoffman v. McMullen, 83 Fed. Rep. 372, 28 C. C. A. 178, 45 L. R. A. 410. See, also, 11 Cent. Dig. § 693, and authorities; Meyers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Edwards v. Randle (Ark.), 38 S. W. Rep. 343, 36 L. R. A. 174, 58 Am. St. Rep. 108; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203.

The test in all such cases is correctly stated in 15 Am. & Eng. Ency. of Law, 934, as follows: "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result."

This demonstrates the actual fallacy of the statement in Gilliam v. Brown, *supra*, that, where such a contract has been executed, the courts will entertain a suit, because "all the harm that can be done to public policy has already been done." This is a gross misconception of the spirit of the rule. The courts leave violators of the law, as they ought to be left, in the condition where it finds them. They are repelled by the courts because of the great supervening principle of public policy involved, without reference to the attitude which one of the parties may occupy to the other, where both are *in pari delicto*. As pungently put in Hoffman v. McMullen, *supra*: "Courts are not organized to enforce the saying that 'there is honor among wrongdoers,' and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions."

The true doctrine was correctly put long ago in Wooten v. Miller, 7 Smedes & M. 386, the court saying: "We have nothing to say in behalf of the morality of the transaction, nor in favor of those who make the defense; but as they interpose the law as a shield, we cannot do less than say it covers and protects them." And again, in Deans v. McLendon, 30 Miss. 343, where the court said: "Courts of justice, in the observance of these rules, are not influenced by any considerations of respect or tenderness for the party who insists upon the illegality of a contract, but exclusively by reasons of public policy. The object is to punish the active agent in the violation of a law by withholding from him the anticipated fruits of his illegal act, and thus, by deterring all persons from violating its mandates, to give sanctity to the law and security to the public." And in McWilliams v. Phillips, 51 Miss. 196, where the court say: "If both, however, concur in the illegal act, and are in equal fault, the modern doctrine is that a court will not entertain the claim of either against the other to carry into effect the illegal contract." And in Williams v. Simpson, 70 Miss. 115, 11 So. Rep. 689, we call special attention to the fact that in every one of these four Mississippi cases the contract was an executed one, the last one being the case of a merchant who merely failed to pay a sufficient privilege tax, and the one in 51 Miss. a case where a liquor dealer had simply failed to pay the required tax—cases where the acts were merely *mala prohibita*. The extraordinary circumstances about the case in 51 Miss. is that it was delivered by the same judge who delivered the opinion in Gilliam v. Brown, in 43 Miss. In the case in 51 Miss. 197, the retail liquor dealer's case, Judge Simrall, speaking for a unanimous court, said: "All the parties participating in the violation of the law are *in pari delicto*. In such cases, the court will not, where the contract has been executed, interfere for the relief of either party, but will leave them in their respective conditions. Where a contract is executory, they will likewise refrain from lending aid to carry it into effect." And, a few lines below, Judge Simrall says that this doctrine, where the contract has been executed, as well as where it is executory, is the modern doctrine. We quite agree with this last statement, and the marvel is that whilst the case in 51 Miss. thus squarely overrules Gilliam v. Brown, eight volumes before, in 43 Miss., no allusion is made to the overruled case. It will thus be seen that in the four Mississippi cases cited above in 7 Smedes & M., in 30 Miss., in 51 Miss., and in 70 Miss., 11 So. Rep., the doctrine—the true modern doctrine—is declared to be in accordance with the excerpts we have made from the American & English Encyclopædia of Law and the Cyclopedia of Law, supported by innumerable citations, that neither a court of law nor a court of equity will entertain a suit by either party to an illegal contract against the other, where the contract is one against public policy, whether executed or executory.

It is true that in the case of Howe v. Jolly,

68 Miss. 323, 8 So. Rep. 513, and in the case of Andrews v. N. O. Brewing Co., 74 Miss. 362, 20 So. Rep. 837, 60 Am. St. Rep. 509, the court followed Gilliam v. Brown, 43 Miss. 641; but it is also true that those cases limped along after that case, without the citation of a single authority, and without a single line of reasoning when, if the court had simply examined the four cases referred to in our reports, and especially the case in 51 Miss., it would have seen that Gilliam v. Brown had been overruled, and the doctrine of 7 Smedes & M. and 30 Miss. reinstated, as to executed contracts; and it would have also noted the pregnant fact that the judge who wrote the opinion in 43 Miss. apologized for it in 51 Miss. by saying that the view established in Mississippi before the case of Gilliam v. Brown, reinstated and thoroughly approved in the cases we have referred to in 51 Miss. 196, and 70 Miss. 113, 11 So. Rep. 689, was the "true modern doctrine." Gilliam v. Brown having thus manifestly been overruled by these two last named cases, the two cases in 68 Miss., 8 So. Rep., and 74 Miss., 20 So. Rep. 60 Am. St. Rep., having inadvertently followed an overruled case, we declare the law in Mississippi now to be as it was stated to be in the four cases, Hoover v. Pierce, 26 Miss. 627; 30 Miss. 343; 51 Miss. 196; and 70 Miss. 113, 11 So. Rep. 689, viz.: That neither a court of law nor a court of equity, in this state, will entertain a suit for relief by either of two parties *in pari delicto* against the other, where the contract is against public policy. The plain truth is, on principle, that the contrary doctrine holds out a premium to those who violate the law, since according to that doctrine, if they can only hurry fast enough to consummate their villainy, the law will help one to get from the other his part of the stolen plunder. In further demonstration of the inaccuracy of the opinion in Gilliam v. Brown, we call attention to two other misstatements of the law therein contained. It is said at page 660 of that opinion, "A bond or deed made for a past cohabitation is good." The American & English Encyclopædia of Law, p. 961, says: "This obligation on the part of the man, however, can not rise above a moral obligation on his part; and as a moral obligation is, as a rule, insufficient to support a contract, it is therefore held by the weight of authority that past cohabitation alone is not sufficient consideration for a promise, not under seal, by the man to remunerate the woman." The other misconception is in confusing the case of a suit by one of two parties to an illegal contract against the other with a suit by one of the parties against a third party, no way connected with the illegal contract, to collect money paid by the other party to the illegal contract, which has been executed, to such third person for the use of the party suing. This principle is clearly stated at page 1007, A. & E. Ency. of Law, par. 9, and it is stated there, with great exactitude of statement, that the reason that the third person cannot defend an action by the latter is "that in such a case the action is not based on the illegal contract, but, instead, upon the independent contract of such third person to deliver over the property received by him."

The same principle is also clearly stated in 9 Cyc. of Law, 563. In all such cases, the case is made out quite independently of any reference to the illegal contract; the suit is on a new promise based upon a new consideration. A striking statement of the principle is found in note 96, p. 560, of the latter authority, where it is said: "The *status* of such a case has been well put thus: Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other is rifling his pockets of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the $1,000 and invested it in some legimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money; that would have been a past transaction, not necessary to be mentioned in the settlement of the new business."

In the unanswerable opinion of Hawley, District Judge of the United States Circuit Court of Appeals, Hoffman v. McMullen, 83 Fed. Rep. 384, 28 C. C. A. 190, 45 L. R. A. 418, the doctrine is thus stated: "In support of these views, the court quotes *in extenso* from Sharp v. Taylor, 2 Phill. Ch. 801, 817, which closed the statement that 'the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in Tenant v. Elliott and Farmer v. Russel, and recognized and approved by Sir William Grant in Thomson v. Thomson;' thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had, and the cases where a recovery cannot be had, of money connected with an illegal transaction, to be gleaned from all the authorities, is substantially this: "That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract, or money due him as profits derived from the contract; but that when the advances have been made upon a new contract remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent

upon that contract, and his case may be proved without reference to it, then he is entitled to recover."

The distinction between the class of cases is clearly set forth in Thomson v. Thomson, 7 Ves. Jr. 470. The master of the rolls, after declaring that the agreement there under consideration was illegal, said: "There is an equity against the fund, I admit, if you can get it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith, as between the individuals, to take advantage of that. A man procures smuggled goods and keeps them, but refuses to pay for them. So, in the Underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money and refused to pay it over, and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support, I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. Tenant v. Elliott is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then how are you to get at it except through this agreement? There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stockjobbing differences. Here you cannot stir a step but through that illegal agreement, and it is impossible for the court to enforce it."

As remarked in this last citation, in the case at bar, as in the case of Thomson v. Thomson, the payment to Woodson, the agent, was payment to Hopkins.

The third mistake in the opinion of Gilliam v. Brown is the statement that one partner in the case of an executed contract, with the avails of an illegal contract in his hands, may be made to account to the other partner for his proportionate part. In A. & E. Ency. of Law, par. 10, p. 1008, it is said: "Where several persons as co-parties enter into an illegal contract, which is executed, and one of such co-parties receives the profits of the contract or fund raised by such contract, it has been held that the courts will not compel him to account to the other co-parties for their share of such profits, as their right to share therein is undoubtedly based upon the illegal contract, and permitting the recovery of their shares would be an enforcement of a part of such contract." And at page 1011, par. 2, the same doctrine is announced. We may also observe, in passing, that in A. & E. Ency. of Law, 1010, note 3, Wooten v. Miller, 7 Smedes & M. 380, is cited as holding: "That if an agent transacts the illegal business without disclosing the fact of his agency, and the money is paid to him in his own right, and not as an intermediary or agent, he cannot be compelled to account therefor to his principal, for the reason that the principal could not show his title to the property except through the illegal contract." And the principle is universal that one party to an illegal contract can have no accounting from the other, where he must call in the aid, directly or indirectly, of the illegal contract to make out his case. It is curious to note in A. & E. Ency. of Law, 1012, that some courts have held that "where the illegal business transacted by the partnership results in losses, and one of the partners has advanced more than his proportion, he cannot force the other partners to reimburse him." This strengthens the position that partners, no more than others, can enforce contracts against public policy, executory or executed. This last statement of the principle as to recovery of losses is the mere complement of the other as to the recovery of profits.

A careful reading of the pleadings and the record, the evidence and the decree, in this case, makes it plain that this suit cannot be maintained, except by the use and through the aid of the illegal contract itself; and that in effect, a decree of affirmance would be a decree assisting in the carrying forward of this unconscionable and illegal scheme.

The bill is reversed and dismissed.

NOTE.—*Enforcement of Illegal Contracts, Executed or Partly Performed.*—Courts will not interfere when parties to a fraudulent, immoral, or illegal contract have fully executed it, but will hold them bound as they find them. Ager v. Duncan, 50 Cal. 325; Clarke v. Ry. Co., 5 Neb. 314; Kerr v. Birnie, 25 Ark. 225; Senton v. English, 2 Nott & McC. 581, 10 Am. Dec. 638; Blystone v. Blystone, 51 Pa. St. 373. On the other hand an agreement void as contrary to public policy will not so far as it has been executed, be disturbed by a court, in order to aid parties *in pari delicto*. Honey v. Storer, 63 Me. 486; Levet v. Creditors, 22 La. Ann. 105. Thus where payment on a bond is made in confederate money, and received without fraud or misrepresentation, both parties having full knowledge of the article paid and received, it is an executed contract, in relation to which the courts will not interfere to aid one party more than another. Washington v. Barnett, 4 W. Va. 84; Walker v. Walker, 44 Tenn. (4 Col.) 304. In the case of Black v. Oliver, 1 Ala. 449, the court held that a condition entered into by the purchaser (a white man) of a slave at a reduced price that he will set her free, is illegal and void, and the purchaser will take the slave discharged of the conditions. So also it has been held that equity will not interfere to deprive a donee of an executed gift on the ground that it was made in view of past illegal consideration, such as a previous seduction and unlawful cohabitation. Carter v. Montgomery, 2 Tenn. Ch 216. So also it has been held that where a provost marshall takes a bond from a bounty broker indemnifying against apprehended desertion of the men, which the bounty worker has produced or enlisted, and several of those men desert; an action by the

assignee of the broker against the provost marshall, alleging an unlawful detention of the bond, and claiming a restoration, could not be obtained on the ground that the contract having been executed, the court would leave the parties, if this contract was illegal, where it found them, and the fact that defendant was a public officer did not affect the rule. Richardson v. Crandall, 30 How. Prac. 134; 11 Cent. Dig. c l. 660.

Part performance will not change the rule as to the non-enforcement of illegal contracts. Thus the American and English Encyclopedia of Law (2nd Ed.), p. 98, says: "The fact that the party seeking to enforce executory provisions of an ille al contract, though they consist only of promises to pay money, has performed the contract on his part, that, unless the other party is compelled to perform, he will derive a benefit therefrom, will not induce the court to enforce such provisions. See also, Tyler v. Larimore, 19 Mo. App. 445; Hooker v. DePalos, 28 Ohio St. 251; Capehart v. Rankin, 3 W. Va. 571, 100 Am. Dec. 779; Central Trai sportation Co. v. Pullmans Palace Car Co., 139 U. S. 60; Goodrich v. Tenney, 144 Ill. 422, 36 Am. St. Rep. 459; Davis v. Sittig, 65 Tex. 497; Hutchins v. Weldin, 114 Ind. 80; Bowman v. Phillips, 41 Kan. 364; Buckey Marble Co. v. Harvey, 92 Tenn. 115; Caldwell v. Bridal, 48 Iowa, 15; Los Angeles v. City Bank, 100 Cal. 18; Richardson v. Buhl, 77 Mich. 632. Thus it was held that where a contract restraining one of the parties from engaging in a particular business is illegal, the fact that the contract is fully performed by the party so restrained does not entitle him to recover the consideration agreed to be paid by the other party. Oliver v. Gilmore, 52 Fed. Rep. 562. Nor will the law imply a promise to pay for benefits which a party may receive by the reason of the performance of the provision of an illegal contract. Bowman v. Phillips, 4 Kan. 364, 13 Am. St. Rep. 292; Ashbrook v. Dale, 27 Mo. App. 649; Gleason v. Railroad Co. (Iowa, 1889), 43 N. W. Rep. 517.

## JETSAM AND FLOTSAM.

### MAINTAINING THE IDEALS OF THE PROFESSION.

Some things are so good that they will bear repeating, especially so where they impress some great moral issue or present some lofty ideal for our attainment. Of this latter class are the famous words of Judge John F. Dillon, on the subject of professional ideals, of which he delivered himself in the course of an address before the American Bar Association in 1894. Judge Dillon said: "There is, I fear, some decadence in the lofty ideals that have characterized the profession in former times. There is in our modern life a tendency—I have thought at times very strongly marked—to assimilate the practice of the law to the conduct of commercial business. In great law firms, with their separate departments and heads, and subordinate bureaus and clerks, with their staff of assistants, there is much resemblance to the business methods of the great mercantile and business establishments situate close by. The true lawyer—not to say the ideal lawyer—is one who begrudges no time and toil, however great, needful to the thorough mastery of his case in its facts and legal principles; who takes the time and gives the labor necessary to go to its very bottom, and who will not cease his study until every detail stands distinct and luminous in the intellectual light with which he has surrounded it. The mptations and exigencies of a large practice make this very difficult, and the result too generally is that the case gets only the attention that is convenient, instead of that which it truly requires. The head of a great firm in a metropolitan city, a learned and able man, was associated with another in a case of much complexity and moment. He expressed warm admiration of the printed argument of his associate counsel, which had cost the latter two months of laborious work, adding, however, that he could not have given that much time to it, because, commercially regarded, it would not have paid him to do so. It is unquestionably the duty of the profession to preserve the traditions of the past—to maintain its lofty ideals—and to this end to guard against what I may perhaps truly describe by calling it the 'commercializing' spirit of the age. The utterance of Him who spake with an authority greater than that of any lawyer or Judge, 'Man lives not by bread alone,' should never be forgotten or unheeded by the lawyer, and will not be by any who comes within the category of what may be termed the 'Ideal Lawyer.'"

## CORRESPONDENCE.

*To the Editor of the Central Law Journal:*

A few days ago an ordinary case of replevin was being tried for the recovery of some whiskies, beer cigars, etc. The jury found for the plaintiffs, and found the amount of value placed upon the goods as sworn to by plaintiffs, and that if the goods could not be returned, then that plaintiffs have judgment for the sum of $—, the value thereof.

The attorney for defendant notified plaintiffs tha his client was ready to turn over the goods according to the verdict and judgment of the court. One of the plaintiffs with his attorney went to the defendant's attorney, got an order for the goods, went to where the goods were, taking a part of them, refusing the others.

They came back and filed a motion for a new trial, or that the court open up the case and give them damages for what they refused to take. The court opened up the judgment, allowed evidence to be introduced as to the value of the stuff refused to be taken, and rendered judgment for the amount.

We do not know whether this comes under the head of "Humor of the Law" or "Notes of Important Decisions." But we thought it of interest to the profession.

W. A. MADARIS.

Hobart, Okla.

## HUMOR OF THE LAW.

A very young lawyer boastingly told a fellow member of the bar that he had received two hundred dollars for speaking in a certain lawsuit. Quietly the other replied: "I received twice that for keeping silent in that very same case."

Another J. P. had just finished giving his decision on a question of law in a manner highly satisfactory to himself. "But," interposed the counsel, "I would like to cite Blackstone."

"The court does not need instruction in the law and he has given his decision," replied the justice.

"Indeed it was not to instruct your honor I desired to cite the authority, but merely to show you how foolish Blackstone is."

Konisburg Pupil: So, professor, does death end all?

Prof. Immanuel Kant: No, there still remains the litigation over the estate.

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James Whitcomb Riley says that he was summoned as a witness in a case tried in an Indiana court where one of the witnesses before him evinced some disinclination to state her age.

"Is it very necessary?" coyly asked the witness, a spinster of uncertain age.

"It is absolutely necessary, madam," interposed the judge.

"Well," sighed the maiden, "if I must I suppose I must. I didn't see how it could possibly affect the case, for you see"—

"Madam," observed the judge, with some asperation. "I must ask you not to further waste the time of this court. Kindly state your age."

Whereupon the spinster showed signs of hysterics.

"I am, that is, I was"—

"Madam, hurry up!" exclaimed the judge, now thoroughly impatient. "Every minute makes it worse, you know."

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# WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. ABATEMENT AND REVIVAL—Mechanic's Liens.—A subcontractor can prosecute a mechanic's lien simultaneously with an action at law against the contractor.—Hunt v. Darling, R. I., 59 Atl. Rep. 398.

2. ACCIDENT INSURANCE—Authority to Waive Policy Provisions.—Where an accident policy provided that no condition should be waived, except by written consent of an officer of the company at the home office, a provision could only be waived in accordance with the policy.—Wheeler v. United States Casualty Co., N. J., 59 Atl. Rep. 347.

3. ACKNOWLEDGMENT — Foreign Deed.— Under Rev. St. 1892, § 1973, a deed acknowledged before a justice in California having no official seal cannot be recorded in this state, and its recordation does not make it *prima facie* evidence, within Const. 1885, art. 16, § 21.—Norris v. Billingsley, Fla., 37 So. Rep. 564.

4. ACCOUNT STATED—Evidence, Admissibility —In action on account for goods sold and delivered, allegations of separate paragraph of complaint, denied by answer, held to present issuable facts, so that it was error to exclude evidence for plaintiff.—Jewett Bros. & Jewett v. Bentson, S. Dak., 101 N. W. Rep. 715.

5. ANIMALS—Sheep Killing, Damages.—Under Code § 2340, the owner of a dog that had killed sheep was not liable for the entire damage, irrespective of how many sheep might have been killed by other dogs.—Anderson v. Halverson, Iowa, 101 N. W. Rep. 781.

6. APPEAL AND ERROR—Equity, Remedy at Law.—Where it appears on the face of a bill that there is a plain and adequate remedy at law and no ground for equitable intervention, an appellate court may first notice such defect.—Williams v. Peeples, Fla., 37 So. Rep. 572.

7. APPEAL AND ERROR—Errors not Assigned.—The supreme court is not bound of its own motion to consider an error not assigned apparent on the face of the record, and ought not to when the judgment is substantially just.—Cole v. Jerman, Conn., 59 Atl. Rep. 425.

8. APPEAL AND ERROR — Evidence, Preponderance.—Where the evidence discloses no clear preponderance against the material findings of fact in favor of defendant, a judgment for defendant necessarily results.—Tate v. Jerman, Wis., 101 N. W. Rep. 679.

9. APPEAL AND ERROR—Motion to Set Aside Default Judgment.—Motions to set aside a default judgment are addressed to the sound discretion of the trial court, which, unless abused, will not be disturbed on appeal.—El Paso & S. W. Ry. Co. v. Kelly, Tex., 83 S. W. Rep. 855.

10. APPEAL AND ERROR—Special Appearance —Where a party appears specially to present the question of jurisdiction over his person, he must restrict his motion to the ground of such jurisdiction.—Ray v. Trice, Fla., 3 So. Rep. 532.

11. APPEAL AND ERROR— Sufficiency of Petition.—Where a petition which states a cause of action was not assailed in the trial court, it is too late to raise a question of its sufficiency on appeal.—Newburn v. Lucas, Iowa, 101 N. W. Rep. 780.

12. BANKRUPTCY—Fraudulent Conveyances, Husband and Wife.—A reconveyance of land by a husband to his wife under a former unrecorded agreement, within four months of the husband's bankruptcy, held fraudulent as to creditors.—Lavender v. Bowen, Iowa, 101 N. W. Rep. 760.

13. BANKS AND BANKING—Attachment, Bills of Lading—Delivery of a bill of lading and draft attached by a banker, to whom the same had been assigned for discount, to the drawer for resale, held not to render the goods subject to attachment by the drawer's creditors.—Mather v. Gordon Bros., Conn., 59 Atl. Rep. 424.

14. BANKS AND BANKING—Partnership Dissolution.—Notice to an employee of a bank of the dissolution of a firm indebted to the bank held not notice to the bank, in the absence of proof that such notice was within the scope of the employee's duties.—Marsh, Merwin & Lemmon v. Wheeler, Conn., 59 Atl. Rep. 410.

15. BILLS AND NOTES—Execution in Blank.—The omission of the name of the payee in a note held not to amount to the leaving of a blank, which a person in possession thereof was impliedly authorized to fill.—Smith v. Willing, Wis., 101 N. W. Rep. 692.

16. BROKERS—Commissions.—A broker held only entitled to recover for the sale of land on his contract, which fixed the terms and price of the sale, on proving the procuring of a purchaser ready, willing and able to purchase at the price and on the terms specified.—Ball v. Dolan, S. Dak., 101 N. W. Rep. 719.

17. BROKERS—Sale Executed by Agent.—Contract for the sale of real estate, executed by agents and adopted in writing by the owner, held in legal effect one between the purchasers and the owner.—Findley v. Koch, Iowa, 101 N. W. Rep. 766.

18. BURGLARY — Attempt to Commit Felony. — An averment that accused broke and entered a car for the

purpose of committing a felony fails to apprise defendant of the specific offense.—State v. Doran, Me., 59 Atl. Rep. 440.

19. CARRIERS—Contributory Negligence, Standing on Running Board.—A passenger held not guilty of contributory negligence as a matter of law by standing on the running board of a street car.—Ft. Wayne Traction Co. v. Hardendorf, Ind., 72 N. E. Rep. 593.

20. CARRIERS—Ejection of Passenger, Complaint.—In action against carrier for injury to passenger, resulting from alleged tortious ejection from street car, charge as to effect of conductor's "carelessly or wantonly" injuring plaintiff held erroneous, under allegations of petition.—Ruebsam v. St. Louis Transit Co., Mo., 83 S. W. Rep. 984.

21. CARRIERS—Liability for Act of Drunken Passenger. —A carrier held not liable for injuries to a passenger, caused by the willful and wanton act of an intoxicated passenger in cutting off the rear car of the train while in motion.—Texas & P. Ry. Co. v. Story, Tex., 83 S. W. Rep. 852.

22. CARRIERS—Passengers, Insulting Language.—Insulting language used by the passenger, if provoked by the insulting words of the conductor, ought not to be considered in mitigation of damages, in a suit by the passenger against the company for an assault by the conductor.—Houston & T. C. R. Co. v. Batchler, Tex., 83 S. W. Rep. 902.

23. CARRIERS—Priority of Liens.—As against third parties without notice, the lien of a carrier for freight held lost by delivery to the consignee.—Lembeck v Jarvis Terminal Cold Storage Co., N. J., 59 Atl. Rep. 360.

24. CHAMPERTY AND MAINTENANCE—Assignment of Nonnegotiable Chose to Attorney.—An assignment of a nonnegotiable chose in action to an attorney for the purpose of permitting him to commence suit thereon in his own name for a portion of the recovery, etc., held contrary to public policy.—Slade v. Zeitfuss, Conn., 59 Atl. Rep. 406.

25. CHATTEL MORTGAGES—Foreclosure, Decree. — In the absence of proof of the value of the property claimed, or evidence to authorize a money decree against the claimants to property sought to be foreclosed, such decree as to the claimants will be reversed.—Cato v. Easterlin, Fla., 37 So. Rep. 562.

26. CHATTEL MORTGAGES—Replevin, Amendment of Petition. — In replevin by a chattel mortgagor, held proper to permit an amendment of the petition setting up fraud in the procuring of the mortgage, and that the same was without consideration.—Sylvester v. Ammons Iowa, 101 N. W. Rep. 782.

27. CONTRACTS—Delay, Building Contracts.—Where a portion of the contractor's delay was chargeable to the owner, he was only entitled to a contract allowance for the balance.—Curry v. Olmstead, R. I., 59 Atl. Rep. 392.

28. CORPORATIONS—Compensation of Officers. — The president of a corporation cannot sue on an implied contract to enforce a claim for services as such officer, where he is a stockholder or director.—Lowe v. Ring, Wis., 101 N. W. Rep. 698.

29. CORPORATIONS—Evidence as to Existence.—On an issue as to the existence of a certain corporation, evidence that a witness had never heard of such an organization, in the place where it was alleged to have had its domicile or elsewhere, held admissible.—Cobb v. Bryan, Tex., 83 S. W. Rep. 887.

30. CORPORATIONS—Guaranty, Dividends.—A corporation may guaranty dividends upon its stock.—Wisconsin Lumber Co. v. Greene & W. Telephone Co., Iowa, 101 N. W. Rep. 742.

31. CORPORATIONS—Service of Process —The return of service on an agent of a corporation need not show all the facts set out in the statute which authorizes and provides for such service, but it is sufficient if they are shown from the record.—El Paso & S. W. Ry. Co. v. Kelly, Tex., 83 S. W. Rep. 855.

32. CORPORATIONS—Stock Lien, Notice to Strangers.—A lien in favor of a corporation on the stock of its members on account of debts due from them may be created by the articles of incorporation or by the by-laws.—Dempster Mfg. Co. v. Downs, Iowa, 101 N. W. Rep. 735.

33. CORPORATIONS—Voting Own Stock.—Person owning stock of corporation standing in name of his grantor in books of corporation held entitled to sue to prevent illegal voting of corporation's own stock.—O'Connor v. International Silver Co., N. J., 59 Atl. Rep. 321.

34. COURTS—Jurisdiction, Parties.—The city court of New Haven has no jurisdiction of a cause, where both parties are nonresidents of the city and no property within the city limits is attached.—Slade v. Zeitfuss, Conn., 59 Atl. Rep. 406.

35. COVENANTS—Breach, Measure of Damages.—In an action on a covenant of warranty, the measure of damages held the value of the growing crops at the time of the conveyance.—Newburn v. Lucas, Iowa, 101 N. W. Rep. 730.

36. CRIMINAL EVIDENCE—Contents of Letter, Secondary Evidence.—It is competent to show by secondary evidence contents of a letter sent by mail to a particular person, as the sending raises a presumption that it was received.—Eatman v. State, Fla., 37 So. Rep. 576.

37. CRIMINAL TRIAL- Continuance, Tales Jurors.—It is not proper to continue a criminal trial for two days to allow the sheriff time to serve a list of tales jurors on the accused.—State v. Bordelon, La., 37 So. Rep. 603.

38. CRIMINAL TRIAL—Overruling Challenge to Juror. Defendant cannot claim a reversal for erroneous rulings in not sustaining challenges for cause, where no objectionable juror was taken on the jury.—Reeves v. State, Tex., 83 S. W. Rep. 803.

39. CRIMINAL TRIAL—Secondary Evidence.—The mere fact that the production of original letters could not be compelled does not avoid the necessity of making an effort to secure their production before press copies are admissible.—State v. Lentz, Mo., 83 S. W. Rep. 970.

40 DEATH—Mortality Tables.—In an action for wrongful death, the parties are entitled to the benefit of the judgment of the jury on the amount of damages sustained, to be computed in accordance with the established rule.—Reynolds v. Narragansett Electric Lighting Co., R. I., 59 Atl. Rep. 393.

41. DEEDS—Execution.—To render a deed effective in conveying an estate, the signing and sealing in the presence of two subscribing witnesses are essential.—Parken v. Safford, Fla., 37 So. Rep. 567.

42. DISTRICT AND PROSECUTING ATTORNEY—Legislature's Right to Abolish Office.—Though the legislature is given the power to abolish the office of commonwealth's attorney, it cannot abolish the tenure of any rightful incumbent of the office.—Adams v. Roberts, Ky., 83 S. W. Rep. 1035.

43. DIVORCE—Living Together, Presumption.—Where a husband and wife live in a mutual home, there is a strong presumption that they are living together as husband and wife, to overcome which the evidence must be very clear and convincing.—Womack v. Womack, Ark., 83 S. W. Rep. 937.

44. ELECTIONS— Effect of Certificate of Election.—A candidate for a public office, who has received the certificate of election, held to possess a *prima facie* title to office.—Nelson v. Sneed, Tenn., 83 S. W. Rep. 786.

45. ELECTRICITY — Negligence, Defective Wiring. — Where death resulted from the breaking of the electrical transformer, a requested instruction that defendant had the right to assume that the interior wiring was improperly done, and that the lamps in the cellar were safely arranged, held to have been properly refused.—Reynolds v. Narragansett Electric Lighting Co., R. I., 59 Atl. Rep. 393.

46. ELECTRICITY— Negligence, Live Wire.—In an action against a street raidroad for injuries to a horse caused by contact with a live wire, evidence held to make a *prima facie* case for plaintiff, and to shift the bur-

den of proof to defendant.—Cleary v. St. Louis Transit Co., Mo., 83 S. W. Rep. 1029.

47. EMBEZZLEMENT—Authority to Use the Money.—In a prosecution for embezzlement, defendant has a right to testify that he had authority to use the money alleged to have been embezzled.—Eatman v. State, Fla., 37 So. Rep. 576.

48. EMBEZZLEMENT—Criminal Intent.—A criminal intent is inferred from the act of an agent or employee in intentionally and unlawfully embezzling and converting to his own use the money belonging to his employer, as denounced by Rev. St. § 1912.—State v. Lentz, Mo , 83 S. W. Rep. 970.

49. EQUITY—Answer, Oath.—If the oath to the answer is waived, complainant is required to maintain the issue only by a preponderance of the evidence.—Parken v. Safford, Fla., 37 So. Rep. 567.

50. EQUITY—Constructive Trust, Misrepresentation as to Purchase Price.—Right of vendee to recover for half the money paid by him for the land, because of fraudulent representations by co-vendee as to purchase price, held not dependent on the existence of a trust or other equitable ground.—Johnston v. Little, Ala., 37 So. Rep. 592.

51. EQUITY — Petitory Action. — In a petitory action where defendant claims by virtue of an adjudication made to his vendor at a judicial sale, parol evidence is admissible as to whetheror not such adjudication was made.—Landry v. Laplos, La., 37 So. Rep 606.

52. EQUITY—Secondary Evidence, Contract Executed in Duplicate.—Where a contract is executed in duplicate, one party, by proving that his copy is lost, has no right to prove the contents by parol.—Norris v. Billingsley, Fla., 37 So. Rep. 564.

53. EVIDENCE—Hearsay.—On an issue as to whether the seller of a stock of goods had fraudulently raised the cost price a certain question to the seller held to call for hearsay evidence.—Sylvester v. Ammons, Iowa, 101 N. W. Rep. 782.

54. EVIDENCE—Mortality Tables.—Standard life and annuity tables, showing at different ages the probable duration of life and the present value of a life annunity, are admissible in evidence in an action for death.—Reynolds v. Narragansett Electric Lighting Co., R. I., 59 Atl. Rep. 393.

55. EVIDENCE—X-ray Photos.—Photographs by the x-ray process are admissible in evidence, where there is nothing to indicate they are misleading.—Miller v. Minturn, Ark., 83 S. W. Rep 918.

56. EXECUTORS AND ADMINISTRATORS—Authority to Sell Real Estate.—After an administrator had sold a part of the real estate to pay debts in execution of an order to sell all of the same, and the estate was settled, held that the order did not authorize a sale of land unsold.—Cole v. Jerman. Conn., 59 Atl. Rep 425

57. EXECUTORS AND ADMINISTRATORS—Deeds, Grantees, Capacity to Take.—A deed conveying property to "the estate of E, deceased, his heirs and assigns," makes the land assets of E's estate.—McKee v. Ellis, Tex., 83 S. W. Rep. 880.

58. EXECUTORS AND ADMINISTRATORS—Sale of Land.—A purchaser of land to pay debts of decedent held entitled to remuneration for taxes, improvements, and purchase price, as a condition to the surrender of the property on sale being declared void.—Patillo v. Martin, Mo., 83 S. W. Rep. 1010.

59. EXECUTORS AND ADMINISTRATORS—Succession Sale, Prescription —The prescription of three years covers the informality resulting from a succession sale having been made at a place not authorized by law.—Landry v. Laplos, La., 37 So. Rep. 606.

60 FALSE PRETENSES—Information, Sufficiency.—An information for false pretenses held bad for failure to show that prosecutor was deceived by the false representations and induced thereby to part with his money.—Stifel v. State, Ind., 72 N. E. Rep. 600.

61. FIRE INSURANCE—Authority of Agent.—Plaintiff having contracted for insurance with defendant's agent held not bound by the agent's failure to correctly report the risk to defendant.—McLaughlin v. American Fire Ins. Co., Iowa, 101 N. W. Rep. 765.

62. FRAUD—Christian Science Healer.—The fact that a statement as to a matter not susceptible of personal knowledge is untrue is not alone evidence that it was made with fraudulent intent, but some knowledge of its untruth must be shown.—Spead v. Tomlinson, N. H., 59 Atl. Rep. 376.

63. FRAUD—Title of Vendor.—In an action for damages for selling to plaintiff property which the seller did not own, held, that a judgment obtained against plaintiff by a mortgagee for conversion was admissible.—Hoge v. Herzberg, Ala., 37 So. Rep. 591.

64. FRAUDULENT CONVEYANCES — Agricultural Homestead.—A debtor may, although not residing upon an agricultural homestead, increase it to the maximum area in order to protect a conveyance thereof from being adjudged fraudulent as against creditors. — Wilks v. Vaughan, Ark., 83 S. W. Rep. 913.

65. FRAUDULENT CONVEYANCES—Homestead, as Against Creditors.—A conveyance of a homestead cannot be fraudulent as against creditors.—Wilks v. Vaughan, Ark., 83 S. W. Rep. 913.

66. GAME—Landowner's Rights.—A landowner's right to take fish and game on his own land is a property right, subject to the state's ownership and title held to regulate and preserve the public use.—State v. Mallory, Ark., 83 S. W. Rep. 955.

67. GAMING — Gambling Devices. — Craps table and chuck-a-luck table held within the prohibition of Rev. St. 1899, § 2194, making it a felony for one to set up and keep gambling devices.—State v. Rosenblatt, Mo., 83 S. W. Rep. 975.

68. GUARDIAN—Recovery of Real Estate.—In an action by a guardian for possession of land belonging to his ward and for damages for its use, relief by injunction against a subsequent conveyance or transfer by defendant is not illegal.—Cole v. Jerman, Conn., 59 Atl. Rep. 425.

69. GUARDIAN AND WARD—Accounting, Advancements. —A guardian, having made advancements to his ward without knowledge as to the purposes to which they were to be devoted, held not entitled to credit therefor in the judicial settlement of his accounts.—*In re* Holscher's Heirs, Iowa, 101 N. W. Rep. 759

70. HIGHWAYS — Discontinuance, a Legislative Act.—The release of the public right in a highway, involved in its discontinuance, is a legislative, and not a judicial function, which may be performed by the legislative agents of the state.—Town of New London v. Davis, N H., 59 Atl. Rep. 369.

71. HIGHWAYS—Rule of the Road.—The fact that one is driving a truck loaded with cotton in violation of the rules to keep to the right gives another no right to neglect the required precaution.—Lee v. Foley, La., 37 So Rep. 594.

72. HIGHWAYS—Suit to Restrain Obstruction.—Where, in a suit to restrain the obstruction of a road, an issue is made as to dedication, an instruction is erroneous which assumes that the land on which the road was located had been appropriated or dedicated to public use.—Evans v. Scott, Tex., 83 S. W. Rep. 874.

73. HOMESTEAD — Survivor, Community Property. — When a surviving wife sells her interest in a community homestead, the homestead right terminates, and the heirs of the deceased husband are entitled to possession of their interest in the property.—York v. Hutcheson, Tex., 83 S. W. Rep. 895.

74. HOMICIDE — Evidence, Bloody Garments. — On a prosecution for murder, held error to permit the wife of deceased to display before the jury the blood-stained clothing worn by her husband at the time of the homicide.—Melton v. State, Tex., 83 S. W. Rep. 822.

75. HOMICIDE—Evidence, Identification.—On prosecution for homicide, bloody shirt taken from body of deceased held admissible, as against objection of insufficient identification as shirt worn by deceased at time he was shot.—Venters v. State, Tex., 83 S. W. Rep. 832.

76. HOMICIDE—Voluntary Manslaughter.—In a prosecution for homicide, evidence that witnesses had heard that defendant had previously killed another child, and had inflicted unusual punishments, held inadmissible.—Ackers v. State, Ark., 83 S. W. Rep. 909.

77. INFANTS—Court's Duty to Guard Infant's Interests.—The court will see that the interests of infants are duly protected in suits in equity, whether claim or defense is properly pleaded or not.—Parken v. Safferd, Fla., 37 So. Rep. 567.

78. INJUNCTION—Covenant Against Exercise of Right.—A covenant by a tunnel company with a railroad company not to acquire any further right by exercise of eminent domain held not enforceable by injunction.—Morris & E. R. Co. v. Hoboken & M. R. Co., N. J., 59 Atl. Rep. 332.

79. INTOXICATING LIQUORS—"Blind Tiger."—On prosecution for running a "blind tiger," letters written by defendant containing orders for liquor and checks in payment thereof held admissible.—Goad v. State, Ark., 83 S. W. Rep. 935.

80. INTOXICATING LIQUORS — Proximate Cause. — Whether one who sells intoxicating liquors is not bound to apprehend that the intoxication caused thereby is likely to produce unjustifiable assaults and consequent injury to the assailant is a question for the jury.—Currier v. McKee, Me., 59 Atl. Rep. 442.

81. INTOXICATING LIQUORS — Wholesalers Retailing Without License.—A licensed wholesale liquor dealer, who gives an agent one quart of whisky for each sale by him of five gallons, held, as to such quart, guilty of retailing liquor without license therefor.—Friedman v. Commonwealth, Ky., 83 S. W. Rep. 1040.

82. JUDGMENT—Authority of Administratrix.—Where, after defendant's death, his administratrix voluntarily entered to defend, she cannot on appeal question the regularity of such proceeding, nor complain of the judgment running against "the defendant."—Cole v. Jerman, Conn., 59 Atl. Rep. 425.

83. JUDGMENT—Larceny, Variance.—A variance between the indictment and the proof as to the name of the owner of the cotton alleged to have been stolen held fatal.—Young v. State, Ark., 83 S. W. Rep. 934.

84. JUDGMENT—Res Judicata.—Judgment in action involving right to possession of chattel held *res judicata*.—American Cotton Co. v. Frank Heierman & Bro., Tex., 83 S. W. Rep. 845.

85. JUDGMENT—Res Judicata, Action on Note.—Judgment for plaintiff in an action for conversion of a note held *res judicata* as to claim by defendant against him in a subsequent suit.—Pickel Stone Co. v. Wall, Mo., 83 S. W. Rep 1018.

86. JUDGMENT—Restraining Enforcement.—Defendant may show default judgment was not authorized by the summons and complaint in a suit to restrain its enforcement—Phillips v. Norton, S. Dak., 101 N. W. Rep. 727.

87. JUDGMENT—Service of Process.—Findings as to the manner of service of a citation, made in a default judgment, may be considered in connection with the return in determining the sufficiency of the service—El Paso & S. W. Ry. Co. v. Kelly, Tex., 83 S. W. Rep. 855.

. JUDGMENT—Warrants of Attorney.—The right of a debtor to plead an extension of the time of payment is personal to him, and the fact that it exists does not prevent the entry of a judgment on warrant of attorney—Strong v. Gaskill, N. J., 59 Atl. Rep. 339

89. JURY—Tales Jurors.—The names of additional jurors, drawn by the commission on the order of the judge, should be placed in the jury box.—State v. Bordelon, La., 37 So. Rep. 603.

90. JURY—Waiver of Special Venire.—Where counsel for the state and for defendant waived a special venire, defendant could not urge error in not having the special venire drawn.—Collins v. State, Tex., 83 S. W. Rep. 806.

91. JUSTICES OF THE PEACE—Execution, Motion to Quash.—A justice of the peace has no jurisdiction of a motion to quash an execution.—Curr v. Pennsylvania R. Co., Mo., 83 S. W. Rep 981.

92. LANDLORD AND TENANT—Oral Lease, Assignment.—Vendee of land subject to oral lease held entitled to maintain action for damages to lease-hold against tenant without assignment.—Shinn v. Guyton & Herington Mule Co., Mo., 83 S. W. Rep. 1015.

93. LIENS—Continuity of Work.—If, while a person is working on a building, the owner sells the land, such person held entitled to a lien for the work and material furnished, whether he completes his contract or not.—Hutchins v. Bautch, Wis., 101 N. W. Rep. 671.

94. LIFE ESTATES—Executrix, Bond.—Where testator requested that no bond be required of his wife as executrix, and she held a life estate with power of disposition, no bond would be required as to the life estate.—McGuire v. Gallagher, Me., 59 Atl. Rep. 445.

95. LIMITATION OF ACTIONS Tacking of Disabilities—Where adverse possession against a female begins during her minority, limitations begin to run against her, under the rule forbidding the tacking of disabilities, upon her marriage.—York v. Hutcheson, Tex., 83 S. W. Rep. 895.

96. MASTER AND SERVANT—Explosion of Mineral Water.—A manufacturer of mineral water is not required to furnish masks to employees handling bottles to prevent injuries from explosions it could not anticipate by the exercise of ordinary care and foresight.—G. A. Duerler Mfg Co. v. Dullnig, Tex., 83 S. W. Rep. 889.

97. MASTER AND SERVANT—Negligence, Independent Contractor.—An employer is not released from liability for negligence by an independent contract, when such contract involves acts which will constitute a nuisance unless properly guarded against.—Keys v. Second Baptist Church, Me., 59 Atl. Rep. 446.

98. MASTER AND SERVANT—Railroads, Injury to Servant.—The act of the conductor in starting an engine, for the purpose of unloading a gravel train, without notice to plaintiff, held the proximate cause of plaintiff's injury by the whipping of a cable attached to the engine.—Southern Indiana Ry. Co. v. Fine, Ind., 72 N. E. Rep. 589.

99. MORTGAGES—Deeds Absolute.—Where persons having no interest in premises, other than possession, convey it as security for a loan, the transaction is a mortgage.—Schneider v. Reed, Wis., 101 N. W. Rep. 682.

100. MORTGAGES—Substituted Securities.—Mortgage of stock securing bonds held to authorize the disposition of the stock and substitution of any equivalent security, and not necessarily of a paper pledge available as collateral therefor.—Ikelheimer v. Consolidated Tobacco Co., N. J., 59 Atl. Rep. 363.

101. MUNICIPAL CORPORATIONS—Dedication, Alley, Adverse User.—Where public authorities have not for 30 years opened an alley dedicated to public use, and it is in possession of the owner of the fee, a stranger to the title cannot remove a fence and cut down trees thereon.—Haramon v. Krause, Minn., 101 N. W. Rep. 791.

102. MUNICIPAL CORPORATIONS—Ordinance, Construction of Sewer.—A city ordinance for the construction of a sewer, referring, for dimensions, material, etc., to specifications alleged to be, but not, on file with the board of public works, held not a compliance with Kansas City Charter, art. 9, § 10.—Dickey v. Holmes, Mo., 83 S. W. Rep. 982.

103. NAMES—Complaint.—One suing as administratrix of the estate of "Ferdinand N," A cannot maintain an action for the death of "Fernando W" A.—Cleveland, C. C. & St. L. Ry. Co. v. Pierce, Ind., 72 N. E. Rep. 604.

104 NAVIGABLE WATERS—Accretion, Ownership.—Land formed by gradual and imperceptible accretion, or

133. SALES—Delivery, Bills of Lading.—Where certain potatoes were sold, the seller to deliver bills of lading to the buyer's order, and stop cars in St. Louis, after delivery of the bills, it was the buyer's duty to procure delivery of the potatoes.—Jones-Pope Produce Co. v. Breedlove, Ark., 83 S. W. Rep. 924.

134. SEARCHES AND SEIZURES—Sufficiency of Search Warrant.—Where a search warrant directed the search of certain property for the discovery of grain, a further provision commanding search of the person of the one against whom it was directed could be regarded as surplusage.—State v. Moore, Iowa, 101 N. W. Rep. 732.

135. SEDUCTION—Corroboration of Prosecutrix.—Under the statute prohibiting conviction for seduction unless the prosecutrix is corroborated, the court should, on request, instruct as to the corroboration required.—Keaton v State, Ark., 83 S. W. Rep. 911.

136. SPECIFIC PERFORMANCE—Indefiniteness, Time of Payment.—Where a contract for the purchase of land had been voluntarily extended, held, that vendor's executor was estopped from setting up as a defense to performance on her part the indefiniteness of the contract as to time of payment.—Tingue v. Patch, Minn., 101 N. W. Rep. 792.

137. SPECIFIC PERFORMANCE — Return of Purchase Money.—In a suit for specific performance, the court cannot award damages on account of the refusal of the vendor to return the purchase money paid.—Findley v. Koch, Iowa, 101 N. W. Rep. 766.

138. SPECIFIC PERFORMANCE—Stipulations for Survey.—Failure to agree on a surveyor, as provided by a contract for sale of land, held not to defeat a suit for specific performance.—Howison v. Bartlett, Ala., 37 So. Rep. 590.

139. STATUTES—Special Election Laws.—Special laws, to be made operative by the voters of a particular locality, are not repealed by general laws, unless specially mentioned in the general law, or such purpose is apparent.—*Ex parte* Neal, Tex., 83 S. W. Rep. 831.

140 STREET RAILROADS—Alighting Passengers, Ditch in Street.—A passenger, allowed to alight from a street car next to a ditch, so entirely covered with water as to be indistinguishable, should be warned or otherwise guarded against the danger, if known to the employees in charge of the car.—MacDonald v. St. Louis Transit Co., Mo., 83 S. W. Rep 1001.

141. STREET RAILROADS—Elements of Damage, Injury to Passenger.—In an action by a passenger against a street railroad for injuries, a charge which included compensation for future expenses for medicines and medical attention held not erroneous.—Parker v. St. Louis Transit Co., Mo., 83 S. W. Rep. 1016.

142. STREET RAILROADS — Negligence, Collision With Vehicle.—In an action by the driver of a hose cart against a street railway company for injuries from a collision, evidence held not to show contributory negligence as a matter of law.—O'Neill v. St. Louis Transit Co., Mo., 83 S. W. Rep. 990.

143. STREET RAILROADS—Occupancy of Highway.—The waiver of prepayment of damages for the occupancy of a highway by a street railroad held not to preclude the abutter from applying for an assessment and payment of the damages.—Strickford v. Boston & M. R. R., N. H., 59 Atl. Rep. 367.

144. STREET RAILROADS—Speed, Collision at Crossing.—In an action for injuries in a street car collision at a crossing, evidence held to authorize submission of the speed issue, though no witness testified as to the number of miles an hour the car was running.—Murray v. St. Louis Transit Co., Mo., 83 S. W. Rep. 995.

145. TELEGRAPHS AND TELEPHONES—Delay in Transmission of Message.—The sender of a telegram asking for a bid on cotton held entitled to maintain an action for negligence whereby the reply message was delayed.—Western Union Tel. Co. v. Love-Banks Co., Ark., 83 S. W. Rep. 949.

146. TRESPASS TO TRY TITLE — Deed, Property Purchased at Tax Sale.—A deed reciting an intention to convey only whatever title the grantor may have acquired in the land by a purchase at tax sale is no evidence of title in the grantor by virtue of that sale.—McKee v. Ellis, Tex., 83 S. W. Rep. 880.

147. TRIAL—Faro Game, Evidence.—In a prosecution for keeping a banking game, the state may show that defendant dealt faro in the same place within two weeks immediately preceding the date charged in the information.—State v. Behan, La., 37 So. Rep. 607.

148. TRIAL—Improper Argument.—Where plaintiff's counsel indulged in improper argument, defendant was only entitled to have the jury admonished without delay not to consider the same.—Southern Indiana Ry. Co. v. Fine, Ind., 72 N. E. Rep 589.

149. TRIAL—Replevin by Mortgagor.—In replevin by a mortgagor of a stock of goods to recover them from the mortgagee, who had seized them on an attempt to foreclose, an instruction of the court erroneously stating the issues held not prejudicial error, in view of other instructions.—Sylvester v. Ammons, Iowa, 101 N. W. Rep. 782.

150. TRIAL—Street Railroads, Personal Injuries.—In action by passenger against street railroad for injuries, refusal to charge on theory that plaintiff fell while the car was in motion held not error.—Parker v. St. Louis Transit Co., Mo., 83 S. W. Rep. 1016.

151. TRUSTS—Selling Real Estate to Carry Out Trust.—Authority given to testamentary trustees to sell real estate to raise funds for carrying out the trust purposes does not authorize them to mortgage the real estate.—Townsend v. Wilson, Conn., 59 Atl. Rep. 417.

152. TRUSTS—Statute of Frauds.—To take an oral trust out of the statute of frauds on the ground of the obtention of the legal title through fraud, an element of positive fraud must be shown.—Ammonette v. Black, Ark., 83 S. W. Rep. 910.

153. VENDOR AND PURCHASER—Abandonment of Contract.—A purchaser of real estate cannot recover damages for the failure of the vendor to convey, where he himself has forfeited his rights under the contract by an abandonment thereof and by negligent delay in complying with its provisions.—Findley v. Koch, Iowa, 101 N. W. Rep. 766.

154. WATERS AND WATER COURSES—Overflowing Land, Pleading and Proof.—Where the petition for overflowing plaintiff's land based recovery on the overflow from a certain stream, the court erred in refusing to instruct the jury that plaintiff could not recover for injury caused by the overflow of another stream.—San Antonio & A. P. Ry. Co. v. Gurley, Tex., 83 S. W. Rep. 842.

155. WATER AND WATER COURSES—Surface Water, Adjoining Owners.—A landowner who so uses his land as to repel surface water is not liable therefor to an adjoining owner.—Barnett v. Matagorda Rice & Irrigation Co., Tex., 83 S W. Rep 801.

156. WATERS AND WATER COURSES—Surface Water, Changing Grade of Lot.—The owner of a city lot, who raised it to the grade of the street, whereby surface water was directed to the basement of plaintiff's building, held not liable for the damages.—Hall v. Rising, Ala., 37 So. Rep. 586.

157. WILLS — Construction. — Executors under a will held not individually entitled to surplus of annual income after payments to certain beneficiaries.—Townsend v. Wilson, Conn., 59 Atl. Rep 417.

158. WILLS—Construction, Defeasible Fee.—A will construed, and held, that the children of testator took a defeasible fee, and not an absolute fee at the death of testator.—Taylor v. Stephens, Ind., 72 N. E. Rep. 609.

159. WITNESSES—Credibility.—The credibility of a witness cannot be corroborated when it has not been stated —Dean v. State, Tex., 83 S. W. Rep. 816.

160. WITNESSES—Embezzlement.—In a prosecution for embezzlement, testimony as to ill-feeling between defendant and his employer is admissible to affect the credibility of an officer of the employer.—Eatman v. State, Fla., 37 So. Rep. 576.

by gradual receding of the water, belongs to the owner of the contiguous land to which the addition is made.—Nix v. Pfeifer, Ark., 83 S. W. Rep. 951.

105. NEGLIGENCE—Gross and Ordinary.—Gross negligence does not include ordinary negligence, and proof of the former does not prove the latter—Rideout v. Winnebago Traction Co., Wis., 101 N. W. Rep. 672.

106. NEGLIGENCE—Injury at Railroad Crossing.—In an action for injuries at a railroad crossing, it was not error for the court to refuse a special charge on the subject of plaintiff's contributory negligence.—Central Texas & N. W. Ry. Co. v. Gibson, Tex., 83 S. W. Rep. 862.

107. NEGLIGENCE—Proximate Cause—The proximate cause of an injury is such cause as operates to produce particular consequences, without the intervention of any independent or unforeseen cause.—Strobeck v. Bren, Minn., 101 N. W. Rep. 795.

108. NEW TRIAL—Cumulative Evidence.—The court did not err in refusing a new trial for newly discovered cumulative testimony.—Northern Texas Traction Co. v. Lewis, Tex., 83 S. W. Rep. 894.

109. NEW TRIAL—Witness Discussing Case in Presence of Juror.—A verdict should be set aside when a witness for the prevailing party discussed the merits of the case in the hearing of certain jurors.—Belcher v. Estes, Me., 59 Atl. Rep. 439.

110. PARTNERSHIP—Authority to Borrow Money.—A partner in a nontrading firm held without authority to borrow money at the expense of the firm.—Powell Hardware Co. v. Mayer, Mo., 83 S. W. Rep. 1008.

111. PARTNERSHIP—Common Property.—A partnership does not exist as to animals and crops, as to which the interest of the parties is in shares, and there is no common property which either has the right to manage or sell.—Beatty v. Clarkson, Mo., 83 S. W. Rep. 1033.

112. PARTNERSHIP—Plumbers, Trading Partnership.—A firm engaged in performance of plumbing contracts held a trading partnership, the members of which were authorized to bind the firm by the execution of commercial paper.—Marsh, Merwin & Lemmon v. Wheeler, Conn., 59 Atl. Rep. 410.

113. PARTNERSHIP—Sale of Goods, Action for Price.—In an action for the price of goods sold to defendants under a written contract, a plea setting up a partnership and that the agreement was made by one partner without authority held to present a good defense.—Sutton v. Webber, Iowa, 101 N. W. Rep. 775.

114. PAYMENTS—Application.—Where there was no direction as to the application of payments on an open running account, the law would apply them so as to cancel the oldest items.—Johnson v. Foster, Iowa, 101 N. W. Rep. 741.

115. PHYSICIANS AND SURGEONS—Christian Science Healer.—A statement of a Christian Science healer that he could and would cure a patient of disease is no evidence that he did something in his unsuccessful treatment which such a healer would not have done.—Spead v. Tomlinson, N. H., 59 Atl. Rep. 376.

116. PHYSICIANS AND SURGEONS—Infrequency of Visits.—A physician is not chargeable with neglect on account of the intervals elapsing between his visits where the injury requires no attention during the intervals, but is negligent where attention is required.—Tomer v. Aiken, Iowa, 101 N. W. Rep. 769.

117. PLEDGES—Collateral Note, Date of Maturity.—Where a collateral note disclosed the date of its maturity, it was not incumbent on the court to inform the jury when it became due.—C. H. Larkin Co. v. Dawson, Tex., 83 S. W. Rep. 882.

118. PRINCIPAL AND SURETY—Duty to Exhaust other Securities.—A contract by defendant, in the nature of suretyship, that she would purchase a certain mortgage at maturity, if the mortgagee desired, held enforceable by the mortgagee, without first resorting to the mortgage.—Law v. Smith, N. J., 59 Atl. Rep. 327.

119. PRINCIPAL AND SURETY—Release of Surety.—A bond given in connection with a note and collateral mortgage considered, and held, that a release of the principal's property from attachment released the surety on the bond, note, and mortgage to the extent of the value of the property released.—National Surety Co. v. Walker, Iowa, 101 N. W. Rep. 780.

120. PUBLIC LANDS—Restraining Drainage Ditch.—A landowner held not precluded from obtaining an injunction to restrain the obstruction of a ditch by an adjoining owner on the ground that the damage was trifling.—Robertson v. Lewis, Conn., 59 Atl. Rep. 409.

121. QUO WARRANTO—To Determine Title to Public Office.—*Quo warranto* to determine title to a public office cannot be brought by a private individual, not claiming the office nor showing that the attorney general has refused to allow the use of his name in behalf of the state—Ney v. Whitley, R. I., 59 Atl. Rep. 400.

122. RAILROADS—Construction, Lien for Labor.—A contractor for railroad improvements held a necessary party defendant in a suit to enforce a lien for labor and materials furnished by third person for such contractor.—Eastern Texas R. Co. v. Davis, Tex., 83 S. W. Rep. 883.

123. RAILROADS—Negligence, Failure to Sound Whistle.—Whether the engineer, in failing to sound whistle after discovering a child two years old on the track, was negligent, held a question for the jury.—Gregory v. Wabash R. Co., Iowa, 101 N. W. Rep. 761.

124. RAILROADS—Operating Trains on Street.—Proof of an injury to a traveler on a street in a collision with a train operated thereon is not evidence of actionable negligence on the part of the railroad company.—Louisville & N. R. Co. v. Lewis, Ala., 37 So. Rep. 587.

125. RAILROADS—Trespassers, Child Killed on Track.—A railroad company held liable for the killing of a trespasser by a train though the conduct of the trainmen as not willful and wanton.—Gregory v. Wabash R. Co., Iowa, 101 N. W. Rep. 761.

126. RELIGIOUS SOCIETIES—Christian Science Healer.—Intelligent and voluntary consent to follow the advice and abide by the prayers of a Christian Science healer precludes recovery for negligence on the ground that public policy opposed such treatment.—Spead v. Tomlinson, N. H., 59 Atl. Rep. 376.

127. REPLEVIN—Appeal, Reference to Decision of Justice.—Reference of counsel on trial in circuit court of a case appealed from justice of the peace as to verdict in the justice's court held not cause for reversal.—Beatty v. Clarkson, Mo., 83 S. W. Rep. 1033.

128. REPLEVIN—Counterclaim.—No counterclaim can be filed in a replevin suit.—Sylvester v. Ammons, Iowa, 101 N. W. Rep. 782.

129. REPLEVIN—Questions on Appeal.—Defendant in replevin held not entitled to raise question on appeal of his right to judgment in his favor against plaintiff and his sureties on bond for articles replevied, but not recovered in the suit.—Beatty v. Clarkson, Mo., 83 S. W. Rep. 1033.

130. SALES—Breach of Warranty.—In an action for breach of warranty in the sale of a jack, the effect of proof of the jack's inefficiency is not destroyed by further proof of subsequent decreased efficiency resulting from neglect.—Wingate v. Johnson, Iowa, 101 N. W. Rep. 751.

131. SALES—Conditions Precedent.—A contract to purchase a partnership stock, when an inventory shall have been taken and matters adjusted, makes the taking of the inventory and adjustment a condition precedent to the liability for the price.—Bressler v. Kelly, Ind., 72 N. E. Rep. 613.

132. SALES—Delivery.—An agreement to purchase an indefinite quantity of goods, followed by delivery and acceptance of a certain quantity, held an executed sale.—Hathaway & Morse v. O'Gorman Co., R. I., 59 Atl. Rep. 397.